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THE

STATUTES, GENERAL ORDERS, AND REGULATIONS

RELATING TO THE

PRACTICE, PLEADING, AND JURISDICTION OF THE COURT OF CHANCERY;

WITH

COPIOUS NOTES.

FOURTH EDITION,

CAREFULLY REVISED AND CONSIDERABLY ENLARGED.

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TO

SIR ROUNDELL PALMER, M.P., Q.C.,

THE FOURTH EDITION OF THIS WORK

IS

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PREFACE TO THE FOURTH EDITION.

SINCE the last Edition of this volume was published, several important Acts within the scope of the work have been passed, and numerous cases bearing upon them, as well as upon the Statutes and Orders embodied in previous editions, have been decided.

In the present Edition the Acts alluded to—including Sir John Rolt's Act, the Transfer of Land and Declaration of Titles Acts, the Railway Companies Act, 1867, and the recent Acts giving equitable jurisdiction to the County Courts—have been incorporated, and the cases applicable to the subject of the work have been brought down to the present time. In addition to this, several parts of the book, particularly those relating to the new rules of evidence, the Revivor of suits, the practice in the Judges' Chambers, and the jurisdiction as to damages under Lord Cairns' Act (21 & 22 Vict. c. 27), have been entirely re-written.

The increase in the bulk of the volume has, however, been in a great measure saved by omitting every portion of the last Edition which was not required for purposes of practical utility; so that, notwithstanding the insertion of nearly 170

pages of new matter, this Edition only contains 37 pages more than the preceding one. The advantage thus gained will be appreciated by those who consider that one of the greatest merits of a book of reference is compendiousness.

By the late Chancery (Ireland) Act (30 & 31 Vict. c. 44), the principal portions of Sir G. Turner's Act, the Master in Chancery Abolition Act, the Chancery Improvement Act, 1852, the Oaths in Chancery Act, and the Order of 5th February, 1861, as to evidence, have been with certain modifications made applicable to Ireland. A tabular analysis of the Act in question, with references to the corresponding English Acts and Orders, and to the pages of the present work, in which they are set out, will be found immediately before the Table of Cases.

In this Edition, the General Orders issued subsequently to February 15, 1860, follow immediately after the Consolidated Orders; and the Schedules to the Consolidated Orders, together with the Regulations as to Fees, and the Judges' and Registrars' Regulations as to business, have been transferred to the Appendix.

The two Acts conferring equitable jurisdiction on the County Courts, and the Orders and Forms relating thereto, are printed at the end of the Appendix.

LINCOLN'S INN,
Nov., 1867.

PREFACE TO THE SECOND EDITION.

THE extremely flattering reception which the First Edition of this work obtained both from the Profession and the Press, has encouraged the Author to re-issue it in a more comprehensive shape, and upon a plan more in unison with the improvements recently introduced into the practice. The Consolidation of the General Orders of the Court of Chancery, though executed with admirable care and ability, has been felt to be practically incomplete, for want of a digest of the numerous decisions upon their construction, which have become as much a part of the practice as the Orders themselves. The most inattentive reader of the Authorised Edition of those Orders must have long since discovered, that their smooth pages preserve intact a variety of controverted questions, which the light of nature will hardly enable him to solve. With the view of supplying, however imperfectly, this admitted want, the Author has, in conformity with the original plan of the work, given under the rules of each Order, as well as under the sections of each Act, a summary of all the cases, nearly three thousand in number, decided thereon, so as to show the practitioner at once what they do and what they do not authorise him to attempt.

The first part of the work, too, containing the Statutes relating to the practice and jurisdiction of the Court, has been considerably altered and enlarged. The sections of the Acts which relate to the salaries and pensions of the Judges and Officers of the Court and other matters of purely personal interest, as well as the now obsolete 17 & 18 Vict. c. 100, have been omitted; and in their place the important sections of the Attornies and Solicitors Act, providing for the delivery and payment of bills of costs; those of the Lands Clauses Consolidation Act, relating to the purchase of lands belonging

to persons having limited interests, and the costs occasioned thereby; Sir Hugh Cairns' Chancery Amendment Act (21 & 22 Vict. c. 27); and Lord St. Leonards' Act for the further relief of Trustees (22 & 23 Vict. c. 35), with several other less important Acts, have been added to this Edition; which, in its present shape, contains *all* the Statutes of Victoria within the scope of the work. The earlier Statutes, such as the 1 Wm. 4, c. 36, relating to the practice, though not printed at length, have been cited and commented upon whenever occasion required.

An elaborate Index to the whole work, constituting, in fact, an alphabetically arranged analysis of the practice, has been prepared for the Author by Mr. C. Austen Leigh, of the Chancery Bar.

These observations will suffice to show that the present Edition is in reality a new work. As the scope of the book has been extended, the difficulties of compilation have greatly increased. Omissions, inexcusable when the results of six or eight years had to be collected, become unavoidable when the search has to be carried back for two hundred. Still no effort has been spared to make the present Edition a complete compendium of the whole *lex scripta* of Chancery practice, founded partly upon positive enactment, and partly upon judicial interpretation. The absolute necessity for some such work, in the present state of the practice, none will deny. When the rules of the Court had to be extracted from the tomes of Vernon or the manuscript notes of Lord Nottingham, such text books as Maddock, and the older editions of Daniell, were not only useful, but indispensable. But now that, thanks to the energy of the Legislature and the Judges, nine-tenths of the whole practice can be summed up in six hundred small octavo pages, it may not unreasonably be hoped that the method adopted in this volume possesses, at least, as much to recommend it as that of the more elaborate but more cumbrous treatises of former days.

G. O. M.

22, Old Buildings, Lincoln's Inn,
April, 1860.

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AND OF THE

ORDERS AND REGULATIONS

INTO WHICH THEY HAVE BEEN INCORPORATED.

CHRONOLOGICALLY ARRANGED.

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Henry V.		Order	17	Order	VIII.	Rule	1	407
1556	Nov. 12			—	IX.	—	6	409
1574	Dec. 25			—	I.	—	42	380
1596	June 23			—	XXXVI.	—	2	563
1618—19	Jan. 29	—	1	—	XXXI.	—	9-11	524, 525
—	— 29	—	3, 4	—	XXXI.	—	14	526
—	— 29	—	13	—	XXXI.	—	9	524
—	— 29	—	15	—	IX.	—	1	408
—	— 29	—	58	—	XIV.	—	2	444
—	— 29	—	59	—	XIV.	—	4	444
—	— 29	—	62	—	XVI.	—	7	457
—	— 29	—	64	—	XIX.	—	2	465
—	— 29	—	71	—	XIX.	—	4	466
—	— 29	—	73	—	IX.	—	6	409
—	— 29	—	77	—	XLII.	—	2	610
—	— 29	—	86	—	XLII.	—	1	609
1621—22	Feb. 18	—		—	XXI.	—	3	470
1622	Oct.	—	2	—	XXXVI.	—	2	563
1623	May 28	—		—	XXI.	—	3	470
1626	June 30	—		—	XXI.	—	3	470
1640	Dec. 31	—		—	XV.	—	6	454
1646—47	Hil. Term	—	2	—	XXI.	—	3	470
1647	Apr. 26	—		—	XXIII.	—	23	494
1656	Oct. 9	—		—	IV.			390
1658	June 25	—		—	XXI.	—	3	470
1660	Nov. 15	—		—	I.	—	36	378
1660	Nov. 15	—		—	XVIII.	—	5	464
1661	May 22	Sand.	296	—	VIII.	—	2	407
—	— 22	—	297	—	I.	—	45	381
—	— 22	—	297	—	VIII.	—	3	407
—	— 22	—	297	—	X.	—	2	419
—	— 22	—	298	—	VIII.	—	1	407
—	— 22	—	298	—	XIV.	—	1	440
—	— 22	—	298	—	XIV.	—	5	445
—	— 22	—	298	—	VIII.	—	1	407
—	— 22	—	299	—	XIV.	—	6, 7	445

Orders Abrogated.				Incorporated into				Pages of Text.
1661	May 22	Sand.	299	Order	XV.	Rule	2	452
—	— 22	—	299	—	XIX.	—	1	465
—	— 22	—	300	—	VIII.	—	1	407
—	— 22	—	300	—	XVI.	—	1	455
—	— 22	—	300	—	XIX.	—	2	465
—	— 22	—	300	—	XL.	—	13	583
—	— 22	—	304	—	XIX.	—	5	467
—	— 22	—	306	—	XXX.	—	1	519
—	— 22	—	308	—	XXIX.	—	4	515
—	— 22	—	308	—	XLII.	—	2	610
—	— 22	—	310	—	IV.	—		390
—	— 22	—	312	—	VII.	—	9—11	405, 406
1666	July 18	Order		—	I.	—	36	378
1667—8	Hil. Term	—	7	—	XXXVI.	—	2	563
1670	Nov. 9	—		—	IX.	—	7	410
1673	May 8	—	4	—	VIII.	—	3	407
—	— 8	—	8	—	XXI.	—	3	470
1674	July 22	—		—	XLII.	—	12	613
—	Nov. 4	—		—	XXX.	—	2	519
1676	Apr. 10	—		—	XIX.	—	14	468
—	July 3	—		—	I.	—	41	380
1685	July 13	—		—	III.	—	11	390
—	— 13	—		—	XXX.	—	2	519
—	May 12	—		—	XXXI.	—	2	521
—	May 26	—		—	XV.	—	6	454
1686	June 9	—		—	I.	—	41	380
1687	May 27	—		—	XXIII.	—	23	494
1688	July 4	—		—	VII.	—	8	403
1689	Oct. 23	—		—	XXXI.	—	6	524
1694	June 12	—		—	XXX.	—	2	519
1697—98	Mar. 19	—		—	III.	—	11	390
1699	Oct. 25	—		—	VII.	—	4	402
1700—1	Mar. 12	—		—	XXXI.	—	12	526
1741	Oct. 17	—		—	XXXI.	—	10, 11	525
—	— 17	—		—	XXXI.	—	13	520
1748	Apr. 27	—		—	XIV.	—	3	444
—	— 27	—		—	XV.	—	5	454
1794	Feb. 7	—		—	XXXI.	—	4	523
1796	Apr. 23	—		—	XXIV.	—	2	542
1807	Feb. 16	—		—	I.	—	1	365
—	— 26	—		Regulations as to fees				xlvii
1814	Dec. 13	—		Order	XXXIII.	Rule	1	528
1815	Jan. 18	—		—	XXI.	—	11	473
1818	Aug. 5	—		—	XL.	—	23	587
1828	Apr. 3	—	24	—	XII.	—	7	437
—	— 3	—	27	—	XL.	—	12	583
—	— 3	—	28	—	XL.	—	12	583
—	— 3	—	29	—	XL.	—	7	581
—	— 3	—	30	—	XL.	—	8	581
—	— 3	—	32	—	XIV.	—	12	447
—	— 3	—	33—5	—	XL.	—	20-22	585—587
—	— 3	—	36	—	XXI.	—	12	473
—	— 3	—	39	—	XXI.	—	7	471
—	— 3	—	40	—	XL.	—	6	578
—	— 3	—	42	—	XXXI.	—	4	523
—	— 3	—	43	—	I.	—	53	382
—	— 3	—	44	—	III.	—	7	388

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1828	Apr. 3	Order 45	Order	XXIII.	Rule 21	493
—	— 3	— 46	—	VI.	— 12	398
—	— 3	— 47	—	VI.	— 13	398
—	— 3	— 53, 4	—	XXXV.	— 10, 11	547
—	— 3	— 55	—	XL.	— 31	590
—	— 3	— 56	—	XXXV.	— 23	552
—	— 3	— 63	—	XXIV.	— 2	501
—	— 3	— 65	—	XXXV.	— 29	555
—	— 3	— 69	—	XXXV.	— 29	555
—	— 3	— 73	—	XXXV.	— 60	562
—	— 3	— 74	—	XVI.	— 4	456
—	— 3	— 76	—	XL.	— 39	594
—	— 3	— 77	—	XXXV.	— 21	552
—	July 4	—	—	XXXIV.	— 3	543
1831	Aug. 3	—	—	XXXI.	— 7	524
—	Nov. 23	—	—	XL.	— 39	594
—	— 23	— 24	—	XII.	— 7	437
—	— 23	— 76	—	XXXV.	— 17	549
—	— 23	— 82	—	XXI.	— 4	471
1833	Dec. 21	— 2, 3	—	XXVIII.	— 1	510
—	— 21	— 4	—	XXVIII.	— 6	512
—	— 21	— 5, 6	—	XXVIII.	— 3, 4	511
—	— 21	— 27	—	I.	— 17	373
—	— 21	— 27	—	XXIII.	— 2	485
—	— 21	— 27	—	XXIII.	— 23	494
—	— 21	— 28	—	XXIII.	— 3	485—487
—	— 21	— 29	—	XXIII.	— 17	492
—	— 21	— 30	—	I.	— 18, 19	373
—	— 21	— 30	—	I.	— 44	381
—	— 21	— 30	—	I.	— 46, 47	381
—	— 21	— 33	—	IV.	—	390
1835	Jan. 29	—	—	XXI.	— 13	474
1837	May 5	— 1—4	—	VI.	— 1—3	392—395
—	— 5	— 5	—	XIV.	— 10	447
—	— 5	— 6	—	VI.	— 4	395
—	— 5	— 9, 12	—	VI.	— 5	395
—	— 5	— 14	—	VI.	— 9	397
—	— 5	— 15	—	VI.	— 11	397
—	— 5	— 16	—	VI.	— 6	396
1838	— 12	—	—	IX.	— 19	416
1839	— 9	— 4	—	XXI.	— 6	472
—	— 9	— 5	—	XX.	—	468
—	— 10	— 1	—	XXIX.	— 6	516
—	— 10	— 2—5	—	XXIX.	— 7—10	516, 517
—	Dec. 7	—	—	XXIII.	— 4	486
1841	Apr. 3	—	—	XXVI.	— 1, 2	506, 507
—	Aug. 26	— 6	—	XXX.	— 5	520
—	— 26	— 7	—	X.	— 10	426
—	— 26	— 9	—	XII.	— 6	437
—	— 26	— 10	—	XXX.	— 4	520
—	— 26	— 13	—	XXIX.	— 5	515
—	— 26	— 15	—	XXIX.	— 2	513
—	— 26	— 16	—	XV.	— 3	453
—	— 26	— 23—27	—	X.	— 11-15	427—429
—	— 26	— 29	—	XL.	— 16	584
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1841	Aug. 26	Order	38	Order	XV.	Rule	4	453
—	— 26	—	40	—	XXIII.	—	11	490
—	— 26	—	42	—	XIX.	—	6	467
—	— 26	—	44, 45	—	XXIII.	—	12, 14	490, 491
—	— 26	—	46	—	XLII.	—	10	612
—	— 26	—	47	—	XL.	—	24	588
—	— 26	—	49	—	XXXII.	—	3	527
—	— 26	—	50	—	XXXI.	—	3	523
—	Nov. 11	—	2	—	VI.	—	2	395
—	— 11	—	5, 6	—	VI.	—	5, 6	395, 396
—	— 11	—	7	—	VI.	—	8	397
—	— 17	—	1—4	—	XXVII.	—	1—4	508—510
—	Dec. 10	—		—	XXVII.	—	2	509
1842	April 11	—	3	—	III.	—	8	389
—	— 11	—	6	—	XXX.	—	4	520
—	— 11	—	6	—	XL.	—	24	588
—	— 11	—	11	—	XXIX.	—	3	513
—	— 11	—	12	—	XXIII.	—	10	489
—	Aug. 5			—	VI.	—	11	397
—	Oct. 26	—	1	—	I.	—	40	380
—	— 26	—	3, 4	—	I.	—	35-37	378, 379
—	— 26	—	5	—	XVI.	—	3	486
—	— 26	—	6	—	I.	—	38, 39	380
—	— 26	—	7	—	XV.	—	6	454
—	— 26	—	8	—	I.	—	43	380
—	— 26	—	9	—	XL.	—	1, 2	575, 576
—	— 26	—	12—14	—	XL.	—	25-27	588, 589
—	— 26	—	15	—	XL.	—	3	577
—	— 26	—	16—21	—	III.	—	1—6	384—388
—	— 26	—	23	—	III.	—	9	389
—	— 26	—	24	—	XVI.	—	3	456
—	— 26	—	25	—	III.	—	10	389
—	— 26	—	26	—	XIX.	—	7	467
—	— 26	—	28	—	XL.	—	4	577
—	— 26	—	30	—	I.	—	52	382
1843	Mar. 17			—	XXIII.	—	24	495
1844	Dec. 6			—	XII.	—	5	436
1845	May 8	—	5	—	V.	—	1—6	390—392
—	— 8	—	11	—	XXXVII.	—	9—14	569, 570
—	— 8	—	16	—	XXXVII.	—	1	506
—	— 8	Ord. 16, Art. 1		—	XXVIII.	—	9	512
—	— 8	— 16, — 2		—	X.	—	17	430
—	— 8	— 16, — 3		—	X.	—	3	420
—	— 8	— 16, — 5		—	X.	—	16	430
—	— 8	— 16, — 10		—	XXXVII.	—	3	566
—	— 8	— 16, — 15		—	XXXVII.	—	6	567
—	— 8	— 16, — 17, 18, 19		—	XIV.	—	14-17	448, 449
—	— 8	— 16, — 21		—	XLII.	—	6	611
—	— 8	— 16, — 32, 33		—	IX.	—	10, 11	412
—	— 8	— 16, — 34		—	XXXIII.	—	11	537
—	— 8	— 16, — 34		—	IX.	—	17	415
—	— 8	— 16, — 37		—	XXXIII.	—	10	534
—	— 8	— 16, — 38		—	XXXVII.	—	7	568
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OF STAT. 30 & 31 VICT. C. 44,

THE CHANCERY (IRELAND) ACT, 1867,

(with References to corresponding English Acts and Orders printed in the text).

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EDITIONS OF BOOKS REFERRED TO.

TITLE OF BOOK.	EDITION.	DATE.
Ayckbourn's Chancery Practice	8th	1866
Chitty's Statutes	3rd	1865
Daniell's Chancery Practice	4th	1865–1867
Lewin's Trustees	5th	1867
Mitford (Lord Redesdale) on Pleadings	4th	1847
Morgan & Davey on Costs	1st	1865
Pemberton on Revivor	1st	1867
Seton on Decrees	3rd	1862
Shelford's Real Property Statutes	7th	1863
Sugden (Lord St. Leonards) Vendors	14th	1862
——— Real Property Statutes	2nd	1862
White & Tudor's Leading Cases	3rd	1867
Williams on Executors	6th	1867

ERRATA AND ADDENDA.

Page 22, line *last* of *note* (*v*), *add* "See, too, *Re Newman*, 36 L. J. Ch. 843; but compare *Re Brown*, *ibid.*, 842, and note (*z*) to next section."

,, 23, ,, *last but one* of *note* (*z*), *add* "*Re Brown*, 36 L. J. Ch. 842."

,, 81, lines 21 to 23, *are incorrect*, and should be read, "The order need not now be made in Chancery as well as Lunacy, where it is desired to appoint a new trustee. See sect. 10 of the Extension Act, p. 116, *post*; but see *Re Boyce*," &c.

,, 175, line 2, *add* "A party need not produce documents relating to the compromise of a dispute between himself and a person no party to the suit, *Warwick* v. *Queen's College, Oxford*, 4 L. R. Eq. 254."

,, 181, ,, *last* of *note* (*i*), *add* "See, too, *Ferguson* v. *Benyon*, 16 W. R. 70 (decided under the Ireland (Chancery) Act)."

,, 191, ,, 2 of *note* (*n*), *add* "As to waiver by the witness of irregularity in the notice to attend the examiner, see *Lawton* v. *Price*, 16 W. R. 73."

,, 209, ,, 3, *Bogg* v. *Midland Railway Co.* is reported 4 L. R. Eq. 311.

,, 211, ,, *last*, *Stratford* v. *Baker* is reported 4 L. R. Eq. 256.

,, 237, ,, 16, *for* "p. 254," *read* "p. 259."

,, 580, ,, *last*, *add* "See, also, *Macann* v. *Borradaile*, 16 W. R. 74."

,, 583, ,, *last* of *note* (*m*), *for* "note (*u*), p. 533," *read* "note (*x*), p. 551."

,, 614. ,, *last* of *note* (*a*), *add* "But see *Southall* v. *James*, 2 W. N. (1867), 268."

,, xxxiv., ,, 2 of *note* (*b*), *Earl of Stamford* v. *Dawson* is now reported 4 L. R. Eq. 352.

,, li., ,, 13 from bottom, *add* (in the *margin*) "In the office of the Accountant-General."

PART THE FIRST.

STATUTES

RELATING TO

THE PRACTICE AND JURISDICTION

OF THE

COURT OF CHANCERY.

JUDGMENTS ACT.

1 & 2 VICT. CAP. 110.

An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain Cases; for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in England. [16*th August*, 1838.

SS. XIII.—XVIII.

1 & 2 Vict. c. 110.

Judgment to operate as a charge on real estate.

XIII. And be it enacted, that a judgment already entered up or to be hereafter entered up against any person in any of her Majesty's superior courts at Westmister shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including lands and hereditaments of copyhold or customary tenure) of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which

1 & 2 Vict. c. 110.

he might without the assent of any other person exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body and all other persons whom he might without the assent of any other person cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments; and that every judgment creditor shall have such and the same remedies in a Court of Equity against the hereditaments, so charged by virtue of this Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgment debt and interest thereon: provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment, or in cases of judgments already entered up, or to be entered up before the time appointed for the commencement of this Act, until after the expiration of one year from the time appointed for the commencement of this Act, nor shall such charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up unless such judgment shall have been entered up one year at least before the bankruptcy: provided also, that as regards purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this Act, such judgment shall not affect lands, tenements, or hereditaments, otherwise than as the same would have been affected by such judgment if this Act had not passed: provided also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of Courts of Equity whereby protection is given to purchasers for valuable consideration without notice (*a*).

Charge not to be enforced until after the expiration of a year.

Proviso as to purchasers, &c.

(*a*) Decrees and orders of Courts of Equity have the effect of judgments (see sect. 18, *infra*), but as to judgments entered up since July 29, 1864, it is now enacted by 27 & 28 Vict. c. 112, s. 1 (*post*), that no land shall be affected by them until it has been delivered in execution by a writ of *elegit* or otherwise. This having been done, the judgment creditor may now obtain an order for sale of the lands by section 4 of the same Act (*post*).

As to registration of a *lis pendens*, see Daniell, 364.

1 & 2 Vict. c. 110.

Sale under 27 & 28 Vict. c. 112.

XIV. And be it enacted, that if any person against whom any judgment shall have been entered up in any of her Majesty's superior courts at Westminster (*b*) shall have any government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person (*c*) in trust for him, it shall be lawful for a judge of one of the superior courts (*b*), on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order.

Stock and shares in public funds and public companies belonging to the debtor, and standing in his own name, to be charged by order of a judge.

(*b*) Charging orders in aid of decrees in equity may be made by the Court of Chancery, and need not be necessarily made by the judge to whose court the cause is attached, *Lord Hastings* v. *Beavan*, 10 W. R. 206; see Seton, 955; Daniell, 935.

Charging orders in aid of decrees in equity.

(*c*) Stock, &c., standing in the name of the Accountant-General may be charged by a judge's order under 3 & 4 Vict. c. 82, s. 1, which is as follows :— "Whereas by an Act passed in the second year of the reign of her Majesty, intituled 'An Act for abolishing arrest on mesne process in civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England,' it was amongst other things enacted, that if any person against whom any judgment should have been entered up in any of her Majesty's superior courts at Westminster should have any government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it should be lawful for a judge of one of the superior courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them, or such part thereof respectively, as he should think fit, should stand charged with the payment of the amount for which judgment should have been so recovered, and interest thereon, and such order should entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been

Charging orders on stock, &c. standing in name of Accountant-General.

3 & 4 Vict. c. 82, s. 1.

1 & 2 Vict. c. 110.

made in his favour by the judgment debtor; provided that no proceedings should be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order: And whereas doubts have been entertained whether the said provisions extend to the cases hereinafter mentioned: Now therefore be it declared and enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords, Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That the aforesaid provisions of the said Act shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent as well in any such stocks, funds, annuities, or shares as aforesaid as also in the dividends, interest, or annual produce of any such stock, funds, annuities or shares; and whenever any such judgment debtor shall have any estate, right, title or interest, vested or contingent, in possession, remainder, or reversion, in, to, or out of any such stocks, funds, annuities or shares as aforesaid, which now are, or shall hereafter, be standing in the *name of the Accountant-General of the Court of Chancery*, or the Accountant-General of the Court of Exchequer, or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such judge to make any order as to such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor: Provided always, that no order of any judge as to any stock, funds, annuities, or shares standing in the name of the Accountant-General of the Court of Chancery or the Accountant-General of the Court of Exchequer, or as to the interest, dividends, or annual produce thereof, shall prevent the Governor and Company of the Bank of England, or any public company, from permitting any transfer of such stocks, funds, annuities, or shares, or payment of the interest, dividends, or annual produce thereof, in such manner as the Court of Chancery or the Court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in any such order." As to stop orders being necessary where the fund is in Court, see Ord. XXVI., *post*.

Provisions of 1 & 2 Vict. c. 110, as to property of judgment debtors extended to stock in name of Accountant-General.

Stop order also necessary.

Order of judge to be made in the first instance *ex parte*, and on notice to the bank or company to operate as a distringas.

XV. And in order to prevent any person against whom judgment shall have been obtained from transferring, receiving, or disposing of any stock, funds, annuities, or shares hereby authorised to be charged for the benefit of the judgment creditor under an order of a judge, be it further enacted, that every order of a judge charging any government stock, funds, or annuities, or any stock or shares in any public company, under this Act, shall be made in the first instance *ex parte*, and without any notice to the judgment debtor, and shall be an order to show cause only; and such order, if any government stock, funds, or annuities standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the Governor and Company of the Bank of England from permitting a transfer of such stock in the meantime and until such order shall be made absolute or discharged (*d*);

and if any stock or shares of or in any public company, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and that if, after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorised agent of such corporation, and before the same order shall be discharged or made absolute, such corporation or person or persons shall permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; and further, that, unless the judgment debtor shall within a time to be mentioned in such order show to a judge of one of the said superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute: provided that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit.

1 & 2 Vict. c. 110.

(*d*) See as to *distringas*, Ord. XXVII., *post*.

XVI. And be it enacted, that if any judgment creditor, who under the powers of this Act shall have obtained any charge or be entitled to the benefit of any security whatsoever, shall afterwards, and before the property so charged or secured shall have been converted into money, or realised, and the produce thereof applied towards payment of the judgment debt, cause the person of the judgment debtor to be taken or charged in execution upon such judgment, then and in such case such judgment creditor shall be deemed and taken to have relinquished all right

Securities not realised to be relinquished if the person taken in execution.

1 & 2 Vict. c. 110.

and title to the benefit of such charge or security, and shall forfeit the same accordingly.

Judgment debts to carry interest.

XVII. And be it enacted, that every judgment debt (*e*) shall carry interest at the rate of four pounds *per centum per annum* from the time of entering up the judgment, or from the time of the commencement of this Act in cases of judgment then entered up and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment.

What are judgment debts within the section.

(*e*) Under this section it was held that interest was not recoverable on costs directed not to be paid by any person but to be raised out of an estate, *Att.-Gen.* v. *Nethercote*, 11 Sim. 529, and see next note. See now as to interest on costs, 23 & 24 Vict. c. 127, s. 27, *post*, pp. 28, 29, and as to interest on debts and legacies established under a decree, see Ord. XLII. 9—11, and note.

Decrees and orders of Courts of Equity, &c., to have effect of judgments.

XVIII. And be it enacted, that all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments (*f*) in the superior courts of common law, and the persons to whom any such monies or costs, charges, or expenses shall be payable, shall be deemed judgment creditors within the meaning of this Act; and all powers hereby given to the judges of the superior courts of common law with respect to matters depending in the same courts shall and may be exercised by Courts of Equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any monies, or costs, charges, or expenses, are by such orders or rules respectively directed to be paid.

What are judgments in equity within the Act.

(*f*) The decree must be for payment of a definite sum to a definite person, or it will not be a charge within the section. Thus a rule for taxation of costs, and the Master's *allocatur* or allowance, were held no charge, but the order for payment of the taxed costs would be one, *Shaw* v. *Neale*, 20 Beav. 157; 6 H. L. 581; *Griffiths* v. *Hughes*, 16 M. & W. 809; *Umpleby* v. *Wavency Valley Railway Company*, 4 J. & H. 254; and see last note, and 1 Chitty's Statutes, 895; Daniell, 931; Ayeb. 205.

CUSTODY OF INFANTS ACT.

2 & 3 VICT. CAP. 54.

An Act to amend the Law relating to the Custody of Infants (*a*). [17*th August*, 1839.

2 & 3 Vict. c. 54.

WHEREAS it is expedient to amend the law relating to the custody of infants (*b*): Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that after the passing of this Act it shall be lawful for the Lord Chancellor and the Master of the Rolls (*b*) in England, and for the Lord Chancellor and the Master of the Rolls in Ireland, respectively, upon hearing the petition (*c*) of the mother of any infant or infants being in the sole custody or control of the father thereof (*d*), or of any person by his authority, or of any guardian after the death of the father, if he shall see fit, to make order for the access of the petitioner to such infant or infants, at such times and subject to such regulations as he shall deem convenient and just; and if such infant or infants shall be within the age of seven years, to make order that such infant or infants shall be delivered to and remain in the custody of the petitioner until attaining such age, subject to such regulations as he shall deem convenient and just (*e*).

Judges in equity may make order, on petition, for access of mothers to their infant children, and if such children be within the age of seven years, for the delivery of them to their custody until attaining such age.

(*a*) As to the right of a father to the custody of his children, and his corresponding obligations, and the jurisdiction of the Court to remove the children from his care if he neglects his duties, or in consequence of his profligacy and immorality, see note to *Eyre* v. *Countess of Shaftesbury*, in 2 W. & T., Leading Cases, 613, 625, 651; *Swift* v. *Swift*, 34 Beav. 266.

Father's right to custody.

An infant becomes a ward of Court, with respect to whom a petition is presented for the appointment of a guardian, *Stuart* v. *Marquis of Bute*, 9 H. L. 440; or under the Infant Settlement Act, 18 & 19 Vict. c. 43; *Re Strong*, 26 L. J. Ch. 64; and see *Re Dalton*, 3 Sm. & Giff. 331; or with respect to whom *an order is made* under the Trustee Relief Act, *Re Hodge*, 3 K. & J. 213, 218; but the mere payment into Court under other Acts, *e.g.* the Lands Clauses Act, or the Legacy Duty Act, of money belonging to an infant, does not constitute such infant a ward of Court, *Re Hillary*, 2 Dr. & Sm. 461; *Re Wilts, &c. Railway Company*, *ibid.* 552; and see *Re Farndell*, cited in Seton, 722.

Wards of Court.

(*b*) "The object of the Act, and of the promoters of it, and that which I think appears upon the face of the Act itself, was, to protect mothers from

General objects of Act.

2 & 3 Vict. c. 54.

the tyranny of those husbands who ill-used them. Unfortunately, as the law stood before, however much a woman might have been injured, she was precluded from receiving justice from her husband by the terror of that power which the law gave to him, of taking her children from her. That was felt to to be so great a hardship and injustice, that Parliament thought the mother ought to have the protection of the law with respect to her children up to a certain age, and that she should be at liberty to assert her rights as a wife, without the risk of any injury being done to her feelings as a mother. That was the object with which the Act was introduced, and that is the construction to be put upon it. It gives the Court the power of interfering: and when the Court sees that the maternal feelings are tortured for the purpose of obtaining anything like an unjust advantage over the mother, that is precisely the case in which it would be called upon, and ought, to interfere. When the parties, therefore, are considering the suggestion which I have thrown out, I wish them to bear in mind that this is not, as was the case in *Wellesley* v. *The Duke of Beaufort* (2 Russ. 1), a question merely as to the general jurisdiction of this Court to interfere with the legal rights of the father; but that I have now an absolute authority over the children under seven years of age, and a larger power than the Court then had with regard to children above that age."—Per Lord Cottenham in *Warde* v. *Warde*, 2 Ph. 787. The Act gives the Court an absolute discretion against the father and testamentary guardian, *Shillito* v. *Collett*, 8 W. R. 683, 696. For cases in which the Court will not interfere under the Act, see note to sect. 4, *infra*.

As to the right of the mother of illegitimate children to have access to them, see *Courtois* v. *Vincent*, Jac. 268.

Legal defences and rights.

The Act does not enable the wife to make a *legal* defence to the application of the husband to have the children delivered up to him: per Lord St. Leonards, when Lord Chancellor of Ireland, in *Corsellis* v. *Corsellis*, 1 Dr. & War. 235: *i.e.* it does not interfere with the legal right of the father to have the custody of the children where no petition has been presented (*Ex parte Young*, 4 W. R. 127). But see *post*, note (*d*).

The jurisdiction of the Court as to infants is not affected by sect. 35 of 21 & 22 Vict. c. 85, the Divorce and Matrimonial Act, which gives a similar power to Courts of Common Law; see 22 & 23 Vict. c. 61, s. 4 (*Re Curtis*, 7 W. R. 474; 5 Jur. N. S. 1147).

(*b*) These words include the Vice-Chancellors (*Re Taylor*, 10 Sim. 291).

Form and mode of application.

(*c*) For form of petition, see Daniell, vol. III., 1860. A married woman may petition under this statute without a next friend (*Re Groom*, 7 Hare, 38), and in *formâ pauperis* (*Ex parte Hakewell*, 3 D. M. G. 116). It seems that the order may be made *ex parte* if the exigencies of the case require it (*Re Taylor*, 11 Sim. 178).

Where children are already in custody of mother.

(*d*) It would appear from the observations of V.-C. Knight Bruce, in *Re Fynn* (2 De G. & Sm. 457, 475), that the Act does not apply where the children are not in the custody of the father. But in a later case (*Re Tomlinson*, 3 De G. & Sm. 371, 372) the same learned judge expressed an opinion that although the child might be, at the time of the presentation and hearing of the petition in the custody of the mother, the Court had, "within the equity of the Act," jurisdiction to interfere. It seems, therefore, that where the mother is living apart from the father (but see *Re Taylor*, 11 Sim. 178, *ante*), and has the custody of the children, the Court may, under the Act, make an order continuing such custody to her (*ibid.*). See *Corsellis* v. *Corsellis*, 1 Dr. & War. 235, cited above, and Daniell, 1862.

Pendency of suit for restitution of conjugal rights.

(*e*) The fact that a suit for the restitution of conjugal rights is pending, which, if successful, would have the same effect as the order prayed for, on petition under this Act, will be sufficient to prevent the Court from interfering (*Re Taylor*, 11 Sim. 178; and see *Re Shaw*, referred to in 11 Sim. 182). For form of order, see Seton, 713; and *Re Fynn*, 2 D. & Sm. 482.

Affidavits to be received

II. And be it enacted, that on all complaints made under this Act, it shall be lawful for the Lord Chancellor

2 & 3 Vict. c. 54.

and parties deposing falsely therein deemed guilty of perjury.

or the Master of the Rolls (*f*) in England, and for the Lord Chancellor or the Master of the Rolls in Ireland, to receive affidavits sworn before any Master in ordinary or Master extraordinary of the Court of Chancery; and that any person who shall depose falsely and corruptly in any affidavit so sworn shall be deemed guilty of perjury, and incur the penalties thereof.

(*f*) See *ante*, note (*b*).

Orders may be enforced by process of contempt.

III. And be it enacted, that all orders which shall be made by virtue of this Act by the Lord Chancellor or the Master of the Rolls in England, and by the Lord Chancellor or the Master of the Rolls in Ireland, shall be enforced by process of contempt of the High Court of Chancery in England and Ireland respectively (*g*).

(*g*) See *post*, Cons. Ord. XXIX.

No mother against whom adultery has been established entitled to benefit of Act.

IV. Provided always, and be it enacted, that no order shall be made by virtue of this Act whereby any mother against whom adultery shall be established, by judgment in an action for criminal conversation at the suit of her husband, or by the sentence of an ecclesiastical court, shall have the custody of any infant, or access to any infant, anything herein contained to the contrary notwithstanding (*h*).

Where the Court refuses to interfere under the Act.

(*h*) Where a husband had filed a petition in the Divorce Court for dissolution of marriage on the ground of alleged adultery of his wife, and the judge, holding that though guilty of great misconduct, she had not committed adultery, dismissed the petition, the Court, in the exercise of its discretion, refused to grant her application for access to her child, who was being educated abroad, as she was living separate from her husband, who was honestly exercising his legal prerogative, *Re Winscom*, 2 H. & M. 541. And generally, if the wife has deserted her husband without justifiable cause, the Court will not interfere under this Act (*Re Taylor*, 11 Sim. 178). But it is not necessary that she should have obtained, or be entitled to obtain, a divorce *à mensâ et thoro* (*Ex parte Bartlett*, 2 Coll. 661. See, too, *Re Curtis*, 7 W. R. 474; 5 Jur. N. S. 1147). Where the mother, although not guilty of any moral delinquency, had contracted extravagant habits, and was without the means of contributing to the children's support, and had also married a second time, concealing that fact from the children's guardian, the Court refused to make an order for the delivery of the children to her (per V.-C. Kindersley in *Shillito* v. *Collett*, 8 W. R. 683).

For other cases where the Court refuses to interfere, see note (*e*), *supra*.

Education of infants.

See generally for the principles of the Court as to guardianship and religious education of infants, *Austin* v. *Austin*, 34 Beav. 257, on app. 13 W. R. 761; *Re Newbery*, 1 L. R. Eq. 431; 1 L. R. Ch. 263; *Nugent* v. *Vetzera*, 2 L. R. Eq. 704; *Re Kaye*, 1 L. R. Ch. 387.

3 & 4 Vict. c. 82, s. 1.

JUDGMENTS ACT.

3 & 4 VICT. CAP. 82, SEC. 1.

[See *ante*, note to 1 & 2 Vict. c. 110, s. 14, p. 3.]

PERPETUATING TESTIMONY ACT.

5 & 6 VICT. CAP. 69.

An Act for perpetuating Testimony in certain Cases.

[30*th July*, 1842.

5 & 6 Vict. c. 69.

(*a*) WHEREAS it is expedient to extend the means of perpetuating testimony in certain cases: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, shall be entitled, from and after the passing of this Act, to file a bill in the High Court of Chancery to perpetuate any testimony which may be material for establishing such claim or right; and that all laws, rules, and regulations not contrary to the provisions of this Act, now in force or in use in suits to perpetuate testimony, or respecting depositions taken in such suits, or the punishment of perjury committed in making such depositions, shall be in force and used and applied in all suits to be instituted under the authority of this Act, and in respect to depositions taken on such suits.

Bills in Chancery to perpetuate testimony may be filed by persons claiming honours, titles, &c., contingent on future events.

(*a*) For the practice as to bills to perpetuate testimony, see notes to Ord. IX. 6, 7.

21 & 22 Vict. c. 93.

Petitions can now be presented in a Common Law Court to establish legitimacy, or a right to be deemed natural-born subjects, 21 & 22 Vict. c. 93.

5 & 6 Vict. c. 69.

Attorney-General to be party defendant in all such suits in which the Queen may have any estate or interest.

II. And be it further enacted, that in all suits which may be so instituted under the authority of this Act, touching any honour, title, dignity, or office, or any other matter or thing, in which her Majesty, her heirs, or successors, may have any estate or interest, it shall be lawful to make the Attorney-General for the time being a party defendant thereto; and that in all proceedings in which the depositions taken in any such suit in which the Attorney-General for the time being was so made a defendant may be offered in evidence, such depositions may be admissible notwithstanding any objection to such depositions upon the ground that her Majesty, her heirs or successors, were not parties to the suit in which such depositions were taken.

ATTORNIES AND SOLICITORS ACT.

6 & 7 VICT. CAP. 73.

An Act for consolidating and amending several of the Laws relating to Attornies and Solicitors practising in England and Wales. [22*nd August*, 1843.

SS. XXXVII.—XLIII.; XLVIII.

6 & 7 Vict. c. 73.

Attornies and solicitors not to commence an action for fees till one month after delivery of their bills.

XXXVII. (*a*) And be it enacted, that from and after the passing of this Act no attorney or solicitor, nor any executor, administrator, or assignee (*b*) of any attorney or solicitor, shall commence or maintain any action or suit (*c*) for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor (*d*), until the expiration of one month (*e*) after such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall have delivered (*f*) unto the party to be charged therewith, or sent by the post to or left (*g*) for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill (*h*) of such fees, charges, and disbursements, and which bill shall either be subscribed (*i*) with the proper

6 & 7 Vict. c. 73, s. 37.

hand of such attorney or solicitor (or, in the case of a partnership, by any of the partners, either with his own name or with the name or style of such partnership), or of the executor, administrator, or assignee of such attorney or solicitor, or be enclosed in or accompanied by a letter subscribed in like manner referring to such bill; and upon the application of the party chargeable (*k*) by such bill within such month it shall be lawful, in case the business contained in such bill or any part thereof shall have been transacted in the High Court of Chancery, or in any other Court of Equity, or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any Court of Law or Equity (*l*) for the Lord High Chancellor or the Master of the Rolls (*l*), and in case any part of such business shall have been transacted in any other court, for the Courts of Queen's Bench, Common Pleas, Exchequer, Court of Common Pleas at Lancaster, or Court of Pleas at Durham (*l*), or any judge of either of them, and they are hereby respectively required to refer (*m*) such bill, and the demand of such attorney or solicitor, executor, administrator, or assignee, thereupon to be taxed and settled (*n*) by the proper officer of the court in which such reference shall be made without any money being brought into court; and the Court or judge making such reference shall restrain such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, from commencing any action or suit touching such demand pending such reference; and in case no such application as aforesaid shall be made within such month as aforesaid, then it shall be lawful for such reference to be made as aforesaid, either upon the application of the attorney or solicitor, or the executor, administrator, or assignee of the attorney or solicitor, whose bill may have been so as aforesaid delivered, sent, or left, or upon the application of the party chargeable by such bill, with such directions and subject to such conditions as the Court or judge making such reference shall think proper (*o*); and such Court or judge may restrain such attorney or solicitor, or the executor,

Reference of bills, whether relating to business transacted in Court or not, for taxation.

Taxation after one month.

administrator, or assignee of such attorney or solicitor, from commencing or prosecuting any action or suit touching such demand pending such reference, upon such terms as shall be thought proper (*p*): Provided always, that no such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill after a verdict shall have been obtained or a writ of inquiry executed in any action (*q*) for the recovery of the demand of such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, or after the expiration of twelve months after such bill shall have been delivered, sent, or left as aforesaid, except under special circumstances (*r*), to be proved to the satisfaction of the Court or judge to whom the application for such reference shall be made; and upon every such reference, if either the attorney or solicitor, or executor, administrator, or assignee of the attorney or solicitor, whose bill shall have been delivered, sent, or left, or the party chargeable with such bill, having due notice (*s*) shall refuse or neglect to attend such taxation, the officer to whom such reference shall be made may proceed to tax and settle such bill and demand *ex parte*; and in case any such reference as aforesaid shall be made upon the application of the party chargeable with such bill, or upon the application of such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, and the party chargeable with such bill shall attend upon such taxation, the costs of such reference shall, except as hereinafter provided for, be paid according to the event of such taxation; that is to say, if such bill when taxed be less by a sixth part than the bill delivered, sent, or left, then such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall pay such costs; and if such bill when taxed shall not be less by a sixth part than the bill delivered, sent, or left, then the party chargeable with such bill, making such application or so attending, shall pay such costs (*t*); and every order to be made for such reference as aforesaid shall direct the officer to

6 & 7 Vict. c. 73, s. 37.

Taxation after twelve months, under special circumstances.

Payment of costs of taxation.

6 & 7 Vict. c. 73, s. 37.

whom such reference shall be made to tax such costs of such reference to be so paid as aforesaid, and to certify what, upon such reference, shall be found to be due to or from such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, in respect of such bill and demand, and of the costs of such reference, if payable: Provided also, that such officer shall in all cases be at liberty to certify specially any circumstances relating to such bill or taxation, and the Court or judge shall be at liberty to make thereupon any such order as such Court or judge may think right respecting the payment of the costs of such taxation: Provided also, that where such reference as aforesaid shall be made when the same is not authorised to be made except under special circumstances, as hereinbefore provided, then the said Court or judge shall be at liberty, if it shall be thought fit, to give any special directions relative to the costs of such reference: Provided also, that it shall be lawful for the said respective Courts and judges, in the same cases in which they are respectively authorised to refer a bill which has been so as aforesaid delivered, sent or left, to make such order for the delivery (*u*) by any attorney or solicitor, or the executor, administrator, or assignee of any attorney or solicitor, of such bill as aforesaid, and for the delivery (*u*) up of deeds, documents, or papers in his possession, custody, or power, or otherwise touching the same, in the same manner as has heretofore been done as regards such attorney or solicitor, by such Courts or judges respectively, where any such business had been transacted in the Court in which such order was made (*v*): Provided also, that it shall not in any case be necessary in the first instance for such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, in proving a compliance with this Act, to prove the contents of the bill he may have delivered, sent, or left, but it shall be sufficient to prove that a bill of fees, charges, or disbursements, subscribed in the manner aforesaid, or enclosed in or accompanied by such letter as aforesaid, was delivered, sent, or left in

Courts may order attorney or solicitor to deliver his bill, and to deliver up deeds, &c.

Evidence of delivery of bill.

manner aforesaid; but nevertheless it shall be competent for the other party to show that the bill so delivered, sent, or left, was not such a bill as constituted a *bonâ fide* compliance with this Act: Provided also, that it shall be lawful for any judge of the Superior Courts of Law or Equity to authorise an attorney or solicitor to commence an action or suit for the recovery of his fees, charges, or disbursements against the party chargeable therewith, although one month shall not have expired from the delivery of a bill as aforesaid, on proof to the satisfaction of the said judge that there is probable cause for believing that such party is about to quit England.

6 & 7 Vict. c. 73, s. 37.

Power to judge to authorise action before expiration of month.

(*a*) Orders of course to tax are obtained by motion, in any branch of the Court, see note (*l*), p. 17; or by petition at the Rolls, Daniell, 1711. Special orders, see note (*m*), *infra*, by summons in chambers, Ord. 2 Aug. 1864, r. 1.

Orders to tax, how obtained.

As to the mode of enforcing orders, see note (*u*), p. 20, and note (*l*), p. 27.

As to whether Courts of Equity have, independently of statute, jurisdiction to order taxation of bills of costs, see *Cowdell* v. *Neale*, 1 C. B. N. S. 332; *Ex parte Lord Cawdross*, 5 M. & W. 545; *Ex parte Arrowsmith*, 13 Ves. 125; *Re Forsyth*, 34 Beav. 140; on appeal, 13 W. R. 932; and see Daniell, 1693.

General jurisdiction to tax.

The Act should be construed liberally for the client (*Englcheart* v. *Moore*, 15 M. & W. 548; *Maddeford* v. *Antswick*, 3 M. & Cr. 423; *Williams* v. *Griffiths*, 10 M. & W. 125).

The sections set out in this work are retrospective with respect to bills unpaid when this Act passed (*Re Lees*, 5 Beav. 410; *Re Rhodes*, 8 Beav. 224).

Sections retrospective.

(*b*) An assignee in bankruptcy is within the Act, *Re Walton*, 4 K. & J. 78.

(*c*) As to pleading non-delivery at law, see *Lane* v. *Glenny*, 7 Ad. & Ell. 33; *Hichins* v. *Tate*, 7 C. B. 873; *Flower* v. *Newton*, 11 Jur. 875.

Non delivery.

An attorney may set off a bill before delivery, *Lester* v. *Lazarus*, 2 C. M. & R. 665; or prove in bankruptcy, *Ex parte Prideaux*, 1 Gl. & Jam. 28; *Ex parte Steele*, 16 Ves. 166; or sue on a promissory note or other *collateral* (see note (*p*) *infra*) agreement, *Jeffryes* v. *Evans*, 14 M. & W. 210; *Thomas* v. *Cross*, 13 W. R. 166; in which case *Waugh* v. *Waddell*, 16 Beav. 521, (where it was held that pending a reference, a solicitor cannot enforce his lien) is commented on.

Remedies of attorney,

Nor does the summary jurisdiction exclude the right of a client to file a bill against his solicitor for an account, *Morgan* v. *Higgins*, 5 Jur. N. S. 236; *O'Brien* v. *Leurs*, 9 Jur. N. S. 321; or to enforce an agreement for delivery by petition, *Re Bailey*, 34 Beav. 392.

and client independently of Act.

After taxation, an action by the solicitor on his bill is a contempt, *Re Campbell*, 3 D. M. G. 585.

(*d*) These words only include business done in the character of solicitor, see note (*s*), *infra*, p. 19.

"Business."

(*e*) A calendar month is meant (s. 48 of the Act) (*Ryalls* v. *Reg.*, 12 Jur. 458). It is to be calculated exclusively of the days on which the bill is delivered and the action brought (*Blunt* v. *Heslop*, 8 Ad. & Ell. 577).

"Month."

(*f*) As to what constitutes delivery, see *Eggington* v. *Cambeledge*, 11 Jur. 932; *Welsh* v. *Silwell*, 11 Jur. 571; *Blandy* v. *De Burgh*, 6 C. B. 623; *Dunn* v. *Hales*, 1 F. & F. 174; *Phipps* v. *Daubney*, 16 Q. B. 514; *Gridley* v. *Austen*, 16 Q. B. 504; *Spyer* v. *Bernard*, 8 L. T. N. S. 396; *Flower* v. *Newton*, 11 Jur. 875; and in the case of a public officer, see *Champ* v. *Stokes*, 6 H. & N. 633; and in that of the committee of a public company, *Edwards* v. *Lawless*, 5 Rly. Ca. 357; *Mant* v. *Smith*, 4 H. & N. Exch. 324; *Blandy* v. *De Burgh*, *Phipps* v. *Daubney*, *ubi sup.* Delivery to a duly authorised agent of the client is sufficient (*Re Bush*, 8 Beav. 66), or, *semble*, to his servant (*M'Gregor* v. *Keiley*, 3 Exch.

What is "delivery."

6 & 7 Vict. c. 73, s. 37.

794). But a delivery to his solicitor is not enough, nor to a friend or relation (*Gridley* v. *Austen*, 16 Q. B. 504, 511; *Re Abbott*, 4 L. T. N. S. 576). It may be sent by post (*Roberts* v. *Lucas*, 11 Exch. 41), and in such a case it is enough if the envelope and a signed letter accompanying it be addressed to the party chargeable (*ibid.*, and *Taylor* v. *Hodgson*, 3 Dowl. & Low. 115; and see *Manning* v. *Glyn*, Jones, Ir. Exch. Rep. 513). When the action was brought against the executors of the client, a delivery to the client himself in his life was held enough (*Reynolds* v. *Caswell*, 4 Taunt. 193, under the 2 Geo. 2, c. 23; see, too, *Tate* v. *Hitchins*, 7 C. B. 875). Where clients were liable on a joint contract, delivery of the bill to one of them was held sufficient (*Mant* v. *Smith*, *supra*). For a form of order for delivery and taxation, see Seton, 831; and as to the mode of enforcing the order, see note (*u*), *infra*.

"Delivery."

(*g*) The bill must be *left*, not merely shown, *Phipps* v. *Daubney*, 16 Q. B. 514; *Crowder* v. *Shee*, 1 Camp. 437.

Form of bill.

(*h*) The bill, or some accompanying document (*Taylor* v. *Hodgson*, 3 Dowl. & Low. 115; *Lucas* v. *Roberts*, 11 Exch. 41), must specify the persons to be charged (*Gridley* v. *Austen*, 16 Q. B. 504; *Champ* v. *Stokes*, 6 H. & N. 683), the Court in which the business was done (*Lewis* v. *Primrose*, 6 Q. B. 265; *Dimes* v. *Wright*, 8 C. B. 831), the name of the cause (*Keene* v. *Ward*, 13 Q. B. 515), and the particular items charged for (*Drew* v. *Clifford*, 2 Car. & P. 69; *Re Smith*, 4 Beav. 309; *Re Pender*, 10 Beav. 390), and as to specifying the number of folios in deeds, see *Re Foster*, 2 D. F. J. 105.

As a general rule, it is sufficient if the bill gives such information as will enable the client to obtain advice as to the taxation (*Haigh* v. *Ousey*, 7 Ell. & Bl. 578; *Cook* v. *Gillard*, 1 Ell. & Bl. 26; *Frowd* v. *Stillard*, 4 C. & P. 51; *Sargent* v. *Gannon*, 7 C. B. 742); and it need not be drawn in the technical form of a debtor and creditor account), *Holmes* v. *Magrath*, 5 Ir. Law Rep. 376).

Unsigned bill.

(*i*) An unsigned bill accompanied by a signed letter referring to the bills is sufficient (*Re Bush*, 8 Beav. 66). An unsigned bill of costs may be referred to taxation by the party chargeable if he chooses to waive the irregularity (*Re Pender*, 8 Beav. 290; on appeal, 2 Phil. 69; *Re Gedye*, 14 Beav. 56; *Re Foster*, 2 D. F. J. 114); but he is not bound to do so (*Billing* v. *Coppock*, 1 Exch. 14).

Client may waive irregularity.

Who, as party chargeable, may apply for taxation.

(*k*) A married woman having separate estate, which she has by agreement made liable (*Waugh* v. *Waddell*, 16 Beav. 521; and see *Re Pugh*, 17 Beav. 338, and *Murray* v. *Barlee*, 3 M. & K. 209); the next friend of an infant (*Re Fluker*, 20 Beav. 143); the executors (*Jefferson* v. *Warrington*, 7 M. & W. 137), or assignees in bankruptcy (*Clarkson* v. *Barber*, 7 Dowl. 87,) of the party originally liable, are parties chargeable within the Act; but an insolvent is not (*Re Halsall*, 11 Beav. 163); nor an outlaw (*Re Maunder*, 6 Q. B. 867). A party in contempt is not incapacitated from applying (*Newton* v. *Ricketts*, 11 Beav. 67). A married woman should apply by her next friend (*Re Waugh*, 15 Beav. 508). Where several persons are jointly chargeable, they should concur in the application (*Re Lewin*, 16 Beav. 608; *Ex parte Mobbs*, 8 Beav. 499; *Re Perkins*, 8 Beav. 241); and an order obtained by one of them alone on an allegation that he alone employed the solicitor, will be discharged as irregular (*ibid.*). But it seems that if one of the parties so liable refuses to concur, the order may be obtained by the other (*Lockhart* v. *Hardy*, 4 Beav. 224; *Re Hair*, 10 Beav. 187, 11 Jur. 139). In *Ex parte Ford*, 23 L. J. Ch. 515, taxation was ordered on the application of one party, the retainer having been *separate*. See, too, *Re Hair*, l. c.; *Re Stephen*, 2 Ph. 562. As to the cases in which security for costs will be required from the person applying, see *Re Pasmore*, 1 Beav. 94; *Re Dolman*, 11 Jur. 1095; *Ex parte Foley*, 11 Beav. 456; *Murrow* v. *Wilson*, 12 Beav. 497; *Re Waugh*, l. c.; Seton, 835.

Security for costs of taxation.

Who *must* apply.

Overseers of the poor are bound to have an attorney's bill taxed before they pay it; and in case of neglect the payment may be disallowed (*Re Overseers of Napton, Warwickshire*, 27 L. T. 124).

Where bills are taxable.

(*l*) The following descriptions of charges have been held to be for business done in no Court and therefore taxable in Chancery.

Charges for Parliamentary business (the equitable jurisdiction not being taken

away by the Acts of 10 & 11 Vict. c. 69, or 12 & 13 Vict. c. 78, *Re Strother*, 3 K. & J. 518; *Re Sudlow*, 11 Beav. 400; *Re Osborne*, 4 Jur. N. S. 296), for obtaining an order at chambers for leave to enter up satisfaction on a bond given to the Crown (*Re Gaitskell*, 1 Ph. 576. See *Ex parte Fleetwood*, 4 Man. & Gr. 640; *Winter* v. *Paine*, 6 D. & E. 645); for obtaining a married woman's acknowledgment (*Re Branson*, 4 Scott, 539); for business done in the court of a revising barrister (*Re Andrews*, 17 Beav. 510); for taking preliminary steps to proceedings in Court (*Wilson* v. *Gutteridge*, 3 B. & C. 157; *Weld* v. *Crawford*, 2 Stark. 538; *Re Barker*, 6 Sim. 476; *Collins* v. *Nicholson*, 2 Taunt. 321); and for other incidental business (see *Brooks* v. *Brooks*, 6 L. J. C. P. 243; *Sansom* v. *Boon*, 4 Campb. 68). 6 & 7 Vict. c. 73, s. 37. Business taxable in Chancery,

Where the solicitor retained his bill and refused to produce it, it was assumed that the Court had jurisdiction, *Re Loughborough*, 23 Beav. 439.

The fact that an action is pending for the amount of the bill, does not give the common law judges jurisdiction to tax the bill, *Cowdell* v. *Neale*, 1 C. B. N. S. 332; *Sayer* v. *Bush*, 1 Man. & Gr. 1027. though action pending,

The section provides that where the business was done entirely in a Court of equity, or entirely out of court, the Lord Chancellor or Master of the Rolls (which words include the Vice-Chancellors, *Re Carew*, 8 Beav. 128; *Re Howard*, *ibid.* 424) have sole jurisdiction; and though, *in general*, the application need not be to that branch of the Court which heard the suit, *Robins* v. *Mills*, 1 Beav. 227; *Re Elmslie*, 12 Beav. 538; *Bingham* v. *Hallam*, 9 L. J. Ch. 104, it is otherwise when the merits of the case enter into the question, *Webb* v. *Grace*, 12 Beav. 489. Application for taxation may be in any branch of the Court.

Where an order of course, made at the Rolls for taxation of a solicitor's bill for business done in a suit depending in another branch of the court, is not made in the suit, but under the Act, an application to discharge the same should be made at the Rolls, *Re Bell*, 2 H. & M. 501.

(*m*) As to the mode of applying for the common order, see note (*a*), *supra*, and for forms of order to refer bills for taxation, see Seton, 828, 830. In the absence of special circumstances the order may be obtained *ex parte*, *and as of course* before twelve months have elapsed from delivery, *Re Pender*, 7 Beav. 487; *Holland* v. *Gwynne*, 8 Beav. 184; Seton, 835; Daniell, 1711; and see as to costs of a special application where an *ex parte* application would have been sufficient, *Re Bignold*, 9 Beav. 269; *Re Atkinson*, 26 Beav. 151; *Re Adamson*, 18 Beav. 460; *Re Lett*, 31 Beav. 488; *Re Cattlin*, 8 Beav. 121; *Re Bracey*, *ibid.* 338. Order before twelve months *ex parte* and *of course*.

If the taxation abates by death of solicitor or client, or both, an order to revive the reference as between the respective representatives may be obtained, *Re Whalley*, 20 Beav. 576, and where the solicitor died the order to revive was *ex parte*, *Re Nicholson*, 29 Beav. 665; *Re Waugh*, *ibid.* 666; and see *Robertson* v. *Southgate*, 7 Hare, 109, and form of order, Seton, 852. Revivor of reference.

An order of course, though right on the merits, is dismissed if obtained in a case where a special application was necessary, *Harris* v. *Sturt*, 4 M. & C. 261; *Grove* v. *Samson*, 1 Beav. 297; *Gregg* v. *Tayler*, 1 Beav. 123. In a doubtful case the client should apply to the solicitor for his consent to an order of course, *Re Taylor*, 15 Beav. 145. Special application

A special application is *not* necessary, merely because the solicitor has commenced an action for his costs, see *Seton*, 841; *Re Farington*, 33 Beav. 347, (though after final judgment given in an action, the Court has no jurisdiction note (*g*), *infra*). So where a client had, in an action at law, not resisted a claim for costs, which were not taxable at law, and which the solicitor had set up in defence to the action, this was no reason for requiring a special application in Chancery for taxation, *Re Lett*, 10 W. R. 6. is *not* necessary though action pending:

A special application *is* necessary under the following circumstances— *is* necessary,

(1) If the application is to tax only part of the bill claimed by the solicitor, (*Re Yetts*, 33 Beav. 412; *Re Byrch*, 8 Beav. 124; *Re Dalby*, *ibid.* 469; *Re Wavell*, 22 Beav. 634; *Stokes* v. *Trumper*, 2 K. & J. 232; but see *Re Fluker*, 20 Beav. 143; *Re Hinton*, 15 Beav. 192,) or the application is made by some only of several parties jointly liable, *Re Ilderton*, 33 Beav. 201. *Secus*, where they are severally liable, *Re Hair*, 10 Beav. 187. (1) If part of a bill only is to be taxed.

6 & 7 Vict. c. 73, s. 37.

(2) Where there is a special agreement.

(2) Where there is a special agreement as to retainer, *Re Thurgood*, 19 Beav. 541, and see *Gillow* v. *Rider*, 15 C. B. 729; or where there is a special agreement as to the costs, *e. g.*, to refer them to arbitration, *Re Winterbotham*, 15 Beav. 80, or to give the solicitor a lien, *Re Moss*, 17 Beav. 59, and see *Re Ransom*, 18 Beav. 220; *Re Fisher*, 18 Beav. 123; but see Seton, 836; Daniell, 1714. A special agreement, respecting some part of the costs, unless it goes to the whole bill, is not held now to be necessarily a bar to an order for taxation, though it was formerly considered to be so, *Re Eyre*, 10 Beav. 569; 2 Ph. 367; and see *Re Forsyth*, 34 Beav. 140; *Re Thompson*, 14 L. T. N. S. 6; but there must be no suppression of the fact of such an agreement, or the order will be discharged, *Re Ingle*, 21 Beav. 275; *Re Carven*, 8 Beav. 436; *Re Holland*, 19 Beav. 314. An agreement to charge a fixed sum in lieu of costs hereafter to be incurred is void, see *Re Newman*, 30 Beav. 196; *Pince* v. *Beattie*, 11 W. R. 979; *Philby* v. *Hazle*, 7 Jur. N. S. 125.; but see as to an agreement to pay a solicitor a fixed salary, *Galloway* v. *Corporation of London*, 4 L. R. Eq. 90.

Irregularity in order waived.

Any irregularity in obtaining the order may be waived by the solicitor, *Re Field*, 16 Beav. 593; *Re Wavell*, 22 Beav. 634; *Re Hair*, 11 Beav. 96; *Re Bevan*, 12 W. R. 196; *Re Bartrum*, *ibid.* 660.

For cases where a bill must be filed, see *Re Forsyth*, 34 Beav. 140.

Taking master's powers.

(*n*) As to the taxing-master's powers under the common reference for taxation, see note to Ord. XL. 1.; and as to reviewal of taxation, see Ord. XL. 35, and for the mode of enforcing orders under the section, see note (*u*), *infra*.

Application after one month.

(*o*) This application may be made *ex parte*. See note (*m*). For forms of order under this clause, see Seton, 829; *Re Bromley*, 7 Beav. 488; note, *Re Becke*, 5 Beav. 406; *Re Field*, 16 Beav. 593.

(*p*) See note (*c*), *supra*.

Verdict at law a bar to taxation.

(*q*) See *Re Barnard* (2 D. M. G. 359). It has been held that where judgment at law has gone against the client *by default*, but no writ of inquiry to assess the damages has been executed, this is not a final judgment so as to prevent taxation in equity, *Re Gedye*, 15 Beav. 254.

Special application after twelve months.

(*r*) Special applications are now made by summons in chambers, Ord. 2 Aug. 1864, r. 1, *post*.

Special circumstances.

Twelve months after delivery, even an unsigned bill can only be taxed under special circumstances, *Re Gedye*, 14 Beav. 56; so that to entitle a client to taxation after twelve months he must show either (1), "pressure accompanied by some overcharge," or (2), "gross overcharge, amounting to fraud," *Re Strother*, 3 K. & J. 528, *Re M'Kay*, 15 L. T. N. S. 101).

Pressure and overcharge.

As to what circumstances constitute such pressure or fraudulent overcharge, see the note to sect. 41, *infra*, on "application to tax after payment" on which applications the question more frequently arises, *Re Williams*, 15 Beav. 417.

Other grounds accounting for the delay.

But the Court may order taxation under this clause on some grounds which could not arise in the case of an application to tax after payment. Thus a dispute and correspondence as to alleged omissions in the bill were held to be a sufficient apology for the lateness of the application in *Re Bagshawe*, 2 De G. & Sm. 205, and see *Binn's Executors* v. *Hey*, 1 D. & L. 661; but the circumstance that the solicitor was suing at law for his fees was not a sufficient apology, *Bennett* v. *Hill*, 21 L. T. 101, and see note (*m*), *supra*. Where the relationship of solicitor and client continued until within a year before the application was made, and the last account had been delivered within the year, it was held a material circumstance in accounting for the delay, *Re Nicholson*, 3 D. F. J. 93, 100; but the solicitor's possession of the papers in the suit was not, *Re Gedye*, 14 Beav. 56, and see *Sayer* v. *Wagstaff*, 5 Beav. 415, *Re Pugh*, 32 Beav. 273, 1 D. J. S. 673.

Where client has not had opportunity to examine.

So where a client has not had proper opportunity to examine the bill, taxation after twelve months has been allowed, *Re Williams*, 15 Beav. 417 (where the bill was delivered just as the client was going abroad); but the client must show that there has been no undue laches or acquiescence on his part, that the special circumstances are such as he could not with reason have availed himself of sooner, *Re Barnard*, 2 D. M. G. 359; but see *Re Strother*, 3 K. & J.

Laches and acquiescence.

513. For cases where lapse of time and laches has been a bar to taxation, see *Re Vines*, 2 D. M. G. 842; *Blagrave* v. *Routh*, 8 D. M. G. 620 (where the application was by bill). And see note (*q*), p. 26, *post*. 6 & 7 Vict. c. 73, s. 37.

In ordering taxation after twelve months the Court will, if necessary, restrict the taxation within certain limits, *Re Nicholson*, 3 D. F. J. 93. Limits of taxation.

(*s*) It is important with reference to the costs of taxation to consider what items included by the solicitor in his bill will be allowed him on a reference for taxation. What items may be included in the bill to be taxed.

Only those payments are allowed on taxation which are made by the solicitor in his professional capacity; see the certificate of the taxing-masters in *Re Remnant*, 11 Beav. 603; and for the taxing-master's discretion as to the amount, see *Re Page*, 32 Beav. 487. Other disbursements should be included in a separate account; but see *Waring* v. *Williams*, 2 Beav. 1. Payments made to counsel for business have been held professional disbursements, *Franklin* v. *Featherstonhaugh*, 1 Ad. & Ell. 478, unless the client appropriated a special sum for such payment, leaving the solicitor no discretion, *Re Bedson*, 9 Beav. 5; but see *Re Metcalfe*, 30 Beav. 406; Daniell, 1724. Cash payments made by the solicitor in proceedings where he was not professionally concerned are not allowed to be included, *Hemmings* v. *Wilton*, 4 C. & P. 318; *Prothero* v. *Thomas*, 6 Taunt. 196; *Re Lees*, 5 Beav. 410; and see *Latham* v. *Hyde*, 1 C. & M. 128; *Fearne* v. *Wilson*, 6 B. & Cr. 86. Thus the fees of a solicitor acting as steward to a manor, are not professional disbursements, *Allen* v. *Aldridge*, 5 Beav. 401; but business done by a solicitor "retained to act as electioneering agent, and to advise and assist the committee," may be included, *Re Osborne*, 4 Jur. N. S. 296. Compare *Re Oliver*, 15 W. R. 331. Disbursements.

A solicitor may apply for taxation of his agent's bill of costs, and though agency business includes many transactions, it may be taxed in one bill, generally on the terms of the applicant paying a sum of money into Court, *Billing* v. *Coppock*, 1 Exch. 14; *Smith* v. *Dimes*, 4 Exch. 32; *Re Smith*, 9 Beav. 342; *Jones* v. *Roberts*, 8 Sim. 397; *Harvey* v. *Mayhew*, 2 W. R. 128; and see *Dare* v. *Robinson*, 7 Hare, 228, Seton, 1716. Taxation of agency bills.

An order directing costs of a suit to be taxed warrants taxation up to the date of the taxing-master's report, *Quarrell* v. *Beckford*, 1 Mad. 285, and see 2 Daniell, 1084. Items to date of report.

Where a solicitor has been retained for a particular business, his bill of costs for carrying it through, constitutes one bill, *Stokes* v. *Trumper*, 2 K. & J. 232, and see *Re Peach*, 2 D. & L. 33. What constitutes one bill.

After the bill has been *referred* for taxation under this statute (see *Davis* v. *Earl of Dysart*, 21 Beav. 124), no alteration can be made in it (*Hays* v. *Trotter*, 5 B. & Ad. 1106; *Re Wells*, 8 Beav. 416; *Re Catlin*, 18 Beav. 519; *Davis* v. *Earl of Dysart*, *ibid.* 124, 8 D. M. G. 33), except by consent, or on a special application for leave to amend, *Re Andrews*, 17 Beav. 510, 514. Thus leave was given to amend by inserting omitted items, and increasing undercharges (see, however, *Re Tilleard*, 32 Beav. 476); but not to decrease overcharges, *Re Whalley*, 20 Beav. 576; nor to withdraw items improperly inserted, *Re Carven*, 8 Beav. 436; *Re Jones*, *ibid.* 479; *Re Blakesly*, 32 Beav. 379. No alteration after *reference* to master, except by leave of Court.

So a solicitor whose bill was referred for taxation, was not allowed to have a previous bill against the same client, which he had retained, included in the taxation, for the purpose of saving costs of taxation, *Re Gregg*, 30 Beav. 259; but it has been doubted whether under an order for a general taxation, a solicitor can have items included which have been taxed and paid under a previous particular taxation, *Tarbuck* v. *Tarbuck*, 4 Beav. 149; and see *Ex parte Quilter*, 4 De G. & Sm. 183. Insertion of additional items.

Where a solicitor has *delivered* his bill, he is bound by it to this extent, that he cannot substitute a second bill for it, even before notice of an order to tax is served on him, without paying all the costs incurred by the client up to the date of the obtaining such order, *Re Chambers*, 34 Beav. 177. Alteration after *delivery*.

(*t*) The rule as to one-sixth is imperative in an ordinary reference to taxation, *Re Woollett*, 15 M. & W. 504. Where the reference is special that rule does not apply, and the costs of the reference are in the discretion of the judge; Rule as to one sixth.

6 & 7 Vict. c. 73, s. 37.

and see *Dickins* v. *Woolcot*, 8 B. & N. 589 ; *Toghill* v. *Grant*, 6 Beav. 348 ; 1 Chitty's Statutes, 157, note (*f*), for the rule as to costs of taxation independently of the act.

Rule as to one sixth.

Where in a suit against a solicitor for a general account, more than one-sixth was taken off in the suit, but less than one-sixth on the taxation, the Court allowed the solicitor the costs of the taxation (*May* v. *Biggenden*, 24 Beav. 207). Where taxation was awarded pending an action for the costs, and more than one-sixth was taken off, the Court ordered the costs of the reference to be paid by the solicitor, and the costs of the action by the client (*Re Hair*, 11 Beav. 96). See *contrà*, before the Act, *Toghill* v. *Grant*, 6 Beav. 348. As to the costs of taxation of several bills, see *Beardsall* v. *Cheetham*, 31 L. T. 115 ; *Ex parte Barrett*, 3 D. & Ch. 731.

Where solicitor is bankrupt.

When more than one-sixth is taken off, the assignees of an insolvent (*Re Peile*, 25 Beav. 561) or bankrupt solicitor are personally liable for the costs of a taxation (*Re Peers*, 21 Beav. 520). See, before the Act, *Re Cole*, 2 Sim. & St. 463 ; and under similar circumstances the insolvent was, notwithstanding his discharge, held personally liable (*Whalley* v. *Williamson*, 6 Man. & Gr. 269).

Calculation of one-sixth.

Where the master disallows some items and adds others, the bill is to be considered as increased by the items allowed and then reduced by the sums disallowed (*Re Hartley*, 2 Jur. N. S. 448 ; and see *Reg.* v. *Eastwood*, 5 Ell. & Bl. 285 ; *Re Clark*, 13 Beav. 173 ; 1 D. M. G. 43 ; and in bankruptcy, *Ex parte Watts*, 2 Mont. & A. 621 ; *Ex parte Christy*, 3 M. & A. 108) ; and as to taking into account items struck out as chargeable against another person, see *Re Clark*, l. c., and the taxing-master's certificate in that case, 13 Beav. 181—3 ; *Re Colquhoun, Ex parte Ford*, 1 Sm. & G. app. 1 ; s. c. on appeal, 5 D. M. G. 35 ; from which it seems that such items must be reckoned in as against the solicitor.

Where client pays costs.

Where a bill was ordered to be taxed (questions as to liability being reserved) and less than a sixth was struck off, it was held that, whatever might be the result of the question reserved, the client must pay the costs of taxation (*Re Shaw*, 20 L. J. Q. B. 280). A client residing abroad applying for taxation, must give security for the costs thereof, Seton, 835, and see note to Ord. XLI. 6, and note (*k*) *supra*.

Security for costs.

Delivery of bill how enforced.

(*u*) Orders under this section for delivery of solicitor's bill or papers may be enforced by attachment, Ord. XXIX. 3 (for which purpose they must be indorsed under Ord. XXIII. 10, *Re Bowen*, 11 W. R. 607) ; or by writ of *fi. fa.* under Ord. XXIX. 6.

When the order was disobeyed, and the solicitor swore that he had no papers from which he could make out his bill, the Court refused to commit him for non-delivery, *Re Ker*, 12 Beav. 390. No action lies at law for disobedience to the order, *Dent* v. *Basham*, 9 Exch. 469. As to enforcing payment of costs found due, see note (*l*) to sect. 43, *post*.

See, further, as to the mode of enforcing the order, Seton, 837, Aycb. 679.

Delivery of papers to client.

As to what deeds a solicitor must deliver up under the order, see Aycb. 671.

The Court will, before the completion of a taxation, order the delivery up of papers by a solicitor to his client, either upon payment into Court of the amount claimed, or in case it appears from the solicitor's own account that a balance is due from him to his client, *Re Beavan*, 33 Beav. 439, and as to inserting a direction for delivery up of papers in the common order for taxation, see *Re Pender*, 8 Beav. 299 ; *Re Teague*, 11 Beav. 318.

Where solicitor is discharged.

If the solicitor discharges himself, *pendente lite*, an order may be obtained for delivery up of papers to the new solicitor, without prejudice to the lien, the new solicitor undertaking to return them within ten days after the hearing, *Heslock* v. *Metcalfe*, 3 M. & C. 183 ; *Wilson* v. *Emmet*, 19 Beav. 233 ; *Re Williams*, 28 Beav. 465 ; and see *Cane* v. *Martin*, 2 Beav. 584.

Other cases as to compelling the delivery of solicitors' bills, papers, &c. (the practice as to which is not altered by the Act) are given in Seton, p. 837, and 1 Chitty, p. 158, note (*a*), and as to the solicitors' lien, see Seton, 856 ; and *Re Moseley*, 15 W. R. 975 ; *Morgan* v. *Davey*, p. 390.

As to the four-day order for delivery of papers and the costs thereof, see *Re Minter*, 19 Beav. 33; *Re Christmas*, *ibid.* 519; *Re Dendy*, 21 Beav. 565.

6 & 7 Vict. c. 73, s. 38.

Four-day order.

Bills may be taxed upon the application of third parties.

XXXVIII. And be it enacted, that where any person (*v*) not the party chargeable with any such bill within the meaning of the provisions hereinbefore contained, shall be liable to pay or shall have paid such bill, either to the attorney or solicitor, his executor, administrator, or assignee, or to the party chargeable with such bill as aforesaid; it shall be lawful for such person, his executor, administrator, or assignee, to make such application (*w*) for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make, and the same reference and order shall be made thereupon, and the same course pursued in all respects, as if such application was made by the party so chargeable with such bill as aforesaid: Provided always, that in case such application is made when, under the provisions herein contained, a reference is not authorised to be made except under special circumstances (*x*), it shall be lawful for the Court or judge to whom such application shall be made to take into consideration any additional special circumstances applicable to the person making such application, although such circumstances might not be applicable to the party so chargeable with the said bill as aforesaid if he was the party making the application (*y*).

(*v*) For form of order, see Seton, 847. Under this section, the bill of a mortgagee's solicitor for business done in regard to the mortgaged estate, may be taxed by the mortgagor (*Re Carew*, 8 Beav. 150; *Re Lees*, 5 Beav. 410; *Re Wells*, 8 Beav. 416), or by subsequent incumbrancers (*Re Taylor*, 18 Beav. 165; *Re Jessop*, 32 Beav. 406). The official manager of a wound-up company may obtain an order under this section, *Re Vardy*, 20 L. J. Ch. 325.

Who entitled to apply under this section: official manager;

A mere volunteer, under no previous liability, undertaking to pay a solicitor's bill, does not acquire a right to tax it, *Re Becke*, 5 Beav. 406. See before the Act, *Langford* v. *Nott*, 1 Jac. & W. 291; and see *Re Barber*, 14 M. & W. 720, where persons liable to highway rates were held not entitled to tax the bill of an attorney employed by the surveyor of highways, on the ground that they were only remotely interested in the payment of the attorney. But where a suit was compromised, plaintiff agreeing to pay defendant's costs, plaintiff was held entitled to an order of course for taxation of the bill, *Re Hartley*, 30 Beav. 620. Compare *Vincent* v. *Venner*, 1 M. & K. 212.

not persons voluntarily undertaking to pay.

The taxation at the instance of the third party must be as between the solicitor and his client, not as between the solicitor and the third party, *Re Wells*, 8 Beav. 416; *Re Jones*, *ibid.* 479; *Re Fyson*, 9 Beav. 117; *Re Barrow*, 17 Beav. 547; *Re Taylor*, 18 Beav. 163; and if the client is not entitled to tax the bill under the Act, *e.g.*, if the bill has been paid without

Taxation on what principle.

Not where bill paid.

6 & 7 Vict. c. 73, s. 38.

pressure on the client, or has been paid twelve months (*post*, p. 26), the third party cannot tax it, under this section; but if an excessive amount has been paid, he must file a bill against the client who paid the bill, to reduce his liability, *Re Massey*, 34 Beav. 463 (where *Re Jessop*, 32 Beav. 406; *Re Baker*, 32 Beav. 526; and *Re Abbott*, 4 L. T. N. S. 576, were not followed). See, too, *Re Forsyth*, 34 Beav. 140, 13 W. R. 923 (on appeal). But a member of the committee of a provisionally registered company was held entitled to an order for taxation, after payment, of the bill of the solicitors employed by the committee, *Re Stephen*, 2 Ph. 562, 577.

Order, when of course.

(*w*) The proceedings under this section may be by order of course (*Re Strafford*, 16 Beav. 27; comp. *Re Moss*, 17 Beav. 340; *Re Bracey*, 8 Beav. 338; *Re Bignold*, 9 Beav. 269) in cases where a like proceeding might have been adopted under s. 37, see note (*m*), p. 17, *Re Hartley*, 30 Beav. 620.

(*x*) See *ante*, note (*m*), and *post* (*f*).

(*y*) See *Re Vardy*, 20 L. J. Ch. 325, as to the force of these words.

Lord Chancellor may direct taxation of bills chargeable on executors, &c.

XXXIX. And be it enacted, that it shall be lawful in any case in which a trustee, executor, or administrator has become chargeable with any such bill as aforesaid, for the Lord High Chancellor or the Master of the Rolls, if in his discretion he shall think fit (*z*) upon the application of a party interested in the property out of which such trustee, executor, or administrator may have paid or be entitled to pay such bill, to refer the same, and such attorney's or solicitor's, or executor's, administrator's, or assignee's demand thereupon, to be taxed and settled by the proper officer of the High Court of Chancery, with such directions and subject to such conditions as such judge shall think fit, and to make such order as such judge shall think fit for the payment of what may be found due, and of the costs of such reference to or by such attorney, or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, by or to the party making such application, having regard to the provisions herein contained relative to applications for the like purpose by the party chargeable with such bill, so far as the same shall be applicable to such cases, and in exercising such discretion as aforesaid, the said judge may take into consideration the extent and nature of the interest of the party making the application: Provided always, that where any money shall be so directed to be paid by such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, it shall be lawful for such judge, if he should think fit, to order the same, or any part thereof, to be paid to such trustee,

executor, or administrator so chargeable with such bill, instead of being paid to the party making such application; and when the party making such application shall pay any money to such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, in respect to such bill, he shall have the same right to be paid by such trustee, executor, or administrator so chargeable with such bill as such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, had. 6 & 7 Vict. c. 73, s. 39.

(*z*) For form of order, see Seton, 848. The proceedings under this section must be by special application (*Re Straford*, 16 Beav. 27); *i. e.* by summons in chambers (1st rule of Aug. 2, 1864, *post*). Application by *cestui que trust.*

Taxation of a bill was ordered under this section though the solicitor had taken security for the amount, *Re Drake*, 22 Beav. 438; but see *Re Thompson*, 13 L. T. N. S. 746; and though the solicitor had been paid (see last section), *Re Dickson*, 8 D. M. G. 655, but in such case the *cestui que trust* seeking to tax must show overcharges amounting to fraud, *ibid.*, and see page 660 of the report; though Lord Romilly, M. R., seems to have held a different opinion, *Re Blackmore*, 13 Beav. 54; *Re Dawson*, 28 Beav. 605; see Seton, 849; and *Re Massey*, cited in note (*v*), last page. The taxation under this section has generally been as between the solicitor and the *cestui que trust*; but see note (*v*) to the last section, and *Re Downes*, 5 Beav. 425, and compare *Re Story*, 8 W. R. 15; *Re Drake*, 22 Beav. 443. After payment. Overcharges.

For form of order where the trustee was dead, see *Re Hallett*, 21 Beav. 250.

XL. And be it enacted, that for the purpose of any such reference upon the application (*a*) of the person not being the party chargeable within the meaning of the provisions of this Act as aforesaid, or of a party interested as aforesaid, it shall be lawful for such Court or judge to order any such attorney or solicitor, or the executor, administrator, or assignee of any such attorney or solicitor, to deliver to the party making such application a copy of such bill, upon payment of the costs of such copy: Provided always, that no bill which shall have been previously taxed and settled shall be again referred (*b*) unless, under special circumstances, the Court or judge to whom such application is made shall think fit to direct a re-taxation thereof. Copy of bill to be delivered to person making application for reference for taxation. No re-taxation.

(*a*) For form of order under this section, see Seton, 848, and see *Re Blackmore*, 13 Beav. 154, 161. Delivery of bill to *cestui que trust.*

(*b*) See Ord. XL. 35, as to reviewal of taxation.

XLI. And be it enacted, that the payment (*c*) of any such bill as aforesaid (*d*) shall in no case preclude the Taxation of bill after payment.

6 & 7 Vict. c. 73, s. 41.

Court or judge to whom application shall be made from referring such bill for taxation (*e*) if the special circumstances of the case (*f*) shall in the opinion of such Court or judge appear to require the same, upon such terms and conditions and subject to such directions as to such Court or judge shall seem right, provided the application for such reference be made within twelve calendar months after payment (*g*).

Security is equivalent to payment. Retainer by solicitor is not.

(*c*) The giving of security is for the purpose of this section equivalent to payment (*Ex parte Turner*, 5 D. M. G. 540; *Sayer* v. *Wagstaffe*, 5 Beav. 415; *Re Harper*, 10 Beav. 284; *Re Currie*, 9 Beav. 602; but see *Re Drake*, 22 Beav. 438; *Re Harries*, 13 M. & W. 3); but retainer by the solicitor is not (*Re Bignold*, 9 Beav. 270; *Re Steele*, 20 L. J. Ch. 562). See, however, *Ex parte Hemming*, 28 L. T. 144; *Ex parte Shackell*, 2 D. M. G. 842.

(*d*) These words apply to all the cases referred to in the preceding sections (*Re Downes*, 5 Beav. 425).

Form of order.

(*e*) For form of order for taxation after payment, see Seton, 843.

Mode of application.

The application was formerly by petition served on the solicitor, and it was held that the petition should state when payment was made, *Re Mash*, 15 Beav. 83. It is now made by summons in chambers. Order Aug. 2, 1864, rule 1. As to the effect of delay in making the application, see "laches and acquiescence," *infra*, note (*g*).

"Special circumstances."

(*f*) The cases on this question, before the passing of this Act, are summed up and commented upon by Lord Cottenham, in the leading case of *Horlock* v. *Smith*, 2 M. & Cr. 495, where his Lordship, after remarking on the absence of all evidence of pressure, observes (p. 520), "The utmost that the cases establish is, that under such circumstances the Court will open a bill, and have it taxed upon proof of specific errors so gross as to amount to evidence of fraud; and if specific errors had been alleged and proved, I might not have been justified in refusing taxation." See the cases cited in the judgment and argument, and in addition thereto, *Massie* v. *Drake*, 4 Beav. 433; *Re Lees*, 5 Beav. 410. The dictum of Lord Cottenham, cited above, was cited and acted upon by Lord Justice Turner in *Re Dickson*, 8 D. M. G. 655.

Since the Act a great variety of cases have been decided as to the meaning of the words "special circumstances." They have generally been held to signify either "pressure, accompanied by some overcharge," or "overcharges or errors so gross as to amount to fraud." It will be convenient to consider each ground under a separate head.

(1). Pressure *accompanied by some overcharge.*

(1) Cases of "pressure accompanied by some overcharge" generally occur where a client has been practically obliged to pay a bill of costs *without having an opportunity of inspecting and examining it*, either because—

Refusal to deliver up deeds.

(*α*) The solicitor having deeds in his possession which he knew it was of importance to the client to obtain without delay, refused to deliver them up unless his bill was first paid; *Re Pugh*, 32 Beav. 173; 1 D. J. S. 673, and cases there cited, *Re Elmslie*, 12 Beav. 538; *Re Alcock*, 2 Coll. 92; *Re Lett*, 31 Beav. 488 (where the solicitor delivered two bills, one on a higher the other on a lower scale, and the client having paid the higher bill under pressure, the delivery of the lower one was held no defence to the order for taxation), *Re Philpotts*, 18 Beav. 84; *Re Newman*, 15 W. R. 630 (where the defence was set up that the client had himself created the difficulty which made the deeds necessary to him);

Threats to enforce securities.

(*β*) Or because the solicitor having securities of the client in his possession threatened to enforce them unless the bill was paid at once (*Re Rance*, 22 Beav. 177; *Re Kinneir*, 7 W. R. 175; *Re Foster*, 2 D. F. J. 105);

Generally taking advantage.

(*γ*) Or, generally, where the solicitor has taken undue advantage of the

6 & 7 Vict. c. 73. s. 41.

exigencies of the client's position, *Re Stephen*, 2 Ph. 562, cited *ante*, p. 22; *Nokes* v. *Warton*, 5 Beav. 448.

Exception where client has had opportunity to examine.

If the client has had an opportunity of examining and taxing the bill, these cases do not apply, and even a week was held sufficient opportunity in *Re Welchman*, 11 Beav. 319 (comp. *Re Mash*, 15 Beav. 83); a fortnight in *Re Neate*, 10 Beav. 181; three weeks in *Re Neate*, *ibid.* 57; and see *Re Drew*, *ibid.* 368; *Re Currie*, 9 Beav. 602; *Nokes* v. *Warton*, (l. c.) *Re Boyle*, 5 D. M. G. 540; *Re Browne*, 1 D. M. G. 322, where it was said that the pressure must have been of such a kind as to have rendered it impossible or difficult to have had the costs taxed before payment and in the ordinary course, and *Re Barrow*, 17 Beav. 547, where the M. R. said that the doctrine of pressure in cases of taxation after payment is not to be extended.

Some overcharge should be proved.

In all such cases the Court will only direct taxation if there is at least a reasonable belief that if the bill be taxed, some of the charges will be disallowed, (*Re Sladden*, 10 Beav. 488); therefore some items of overcharge ought to be pointed out, *Re Brady*, 15 W. R. 632; though not necessarily such as to amount to fraud, *Re Wells*, 8 Beav. 416; *Re Hubbard*, 15 Beav. 251; *Re Abbott*, 18 Beav. 393; *Re Towle*, 30 Beav. 170; *Re Newman*, 15 W. R. 630; and the absence of any affidavit or other proof as to items of overcharge, will be a reason for dismissing the petition *Ex parte Barton*, 4 D. M. G. 108; affirming S. C. 16 Beav. 585.

Payment under protest.

So the fact that the bill was paid under protest is only material if connected with circumstances of pressure or overcharge, and where a bill is paid under protest, the particular items objected to should, if possible, be pointed out, *Re Davie*, 8 W. R. 15; see *Re Dearden*, 9 Exch. 210; *Re Bayley*, 18 Beav. 415.

(2) Fraudulent overcharge (*without pressure*).

(2) Where there is no pressure the Court will only order taxation after payment on proof of "overcharges amounting to evidence of fraud," *Re Strother*, 3 K. & J. 518.

Some of the particular charges relied on, must be specifically pointed out, *Re Browne*, 1 D. M. G. 322, 333; *Dunt* v. *Dunt*, 9 Beav. 146; *Re Towle*, 30 Beav. 170. Compare *Re Dawson*, 28 Beav. 605.

Trifling items will be insufficient, *Re Drake*, 8 Beav. 123; *Re Thompson*, *ibid.* 237; *Re Bayley*, 18 Beav. 415.

Onus is on the client.

And if the practice in the taxing master's office as to allowing the charges impugned to be uncertain, the solicitor has the benefit of the doubt, *Re Walsh*, 12 B. 440; and generally the onus is on the applicant to show that the charges under the special circumstances were fraudulent, see *Re Towle*, 30 Beav. 170, where charges for eight attendances in one day were held not sufficient to open a paid bill, and *Re Boyle*, 5 D. M. G. 546, where 240 letters were written in one year.

Circumstances evidencing fraud.

But where the solicitor had before action offered to take 40*l.* in lieu of a bill of 68*l.*, it was held a case for reference to taxation after twelve months, *Hughes* v. *Murray*, 9 L. T. N. S. 93; and in *Re Loughborough*, 23 Beav. 439, the solicitor kept back his bill, and fraud was presumed against him.

Fraudulent items.

And when a considerable portion of the bill is for business which in the exercise of a fair and honest discretion ought never to have been done, the Court directs taxation, *Re Barrow*, 17 Beav. 547; *Re Dickson*, 8 D. M. G. 655; *Horlock* v. *Smith*, 2 M. & C. 495; *Waters* v. *Taylor*, *ibid.* 526; *Re Brady*, 15 W. R. 632; and see *Cook* v. *Earl of Rosslyn*, 8 Jur. N. S. 875; *Re Hook*, 3 Giff. 372.

Actual fraud.

Where the overcharges evidence *actual fraud*, very slight circumstances will induce the Court to re-open the taxation (*Re Harding*, 10 Beav. 250; *Nokes* v. *Warton*, 5 Beav. 448). So where the solicitor has also acted as a trustee *Todd* v. *Wilson*, 15 L. J. Ch. 450; but see *Stanes* v. *Parker*, 10 Jur. 603.

Gross overcharges.

See further, with reference to great overcharges, in addition to the cases cited above, *Ex parte Andrews*, 13 L. J. Ch. 222; *Ex parte Hemming*, 28 L. T. 144; and *Sayer* v. *Wagstaff*, 5 Beav. 415; *Re Bennett*, 8 Beav. 467; *Re Sladdan*, 10 Beav. 488; and at law, *Newton* v. *Boodle*, 4 C. B. 359; *Re Dearden*, 9 Exch. 210.

Application by *cestui que trust*.

It was said in *Re Drake*, 22 Beav. 438, that it was not incumbent on a *cestui que trust* who applies for taxation under this and the 38th and 39th

6 & 7 Vict. c. 73, s. 41.

sections to show overcharges amounting to fraud; compare *Re Turner*, 4 W. R. 805; *Re Billing*, 18 L. T. 2; and *Re Dawson*, 8 W. R. 564; 6 Jur. N. S. 878; but see *contrà*, *Re Dickson*, cited in note (*z*), p. 23.

Where on a petition being presented for taxation of a paid bill, the solicitor offered to repay items objected to, and the petitioner nevertheless brought on his petition for hearing, the Court ordered taxation, treating those items as omitted (*Re Catlin*, 23 Beav. 412; but see *Ex parte Hemming*, 28 L. T. 144).

See further, as to special circumstances at law, *Re Whicher*, 13 M. & W. 549; *Re Wilton*, 13 L. J. Q. B. 17, and *ante*, note (*r*), p. 18.

Twelve months after payment,

(*q*) As to the mode of calculating the time, see *Blunt* v. *Heslop*, 8 Ad. & Ell. 577, cited in note (*e*), p. 15; and in cases where security has been given, see cases cited in note (*c*), p. 24. The petition is considered as presented on the day of answering it (*Sayer* v. *Wagstaff*, 5 Beav. 415, but see s. c. as to accidental delay, and see now, Order of Aug. 2, 1864, r. 1, *post*; *Jones* v. *Powys*, 10 L. J. Exch. 49); see, however, note (*w*), p. 19, as to what accounts will constitute one bill.

strictly calculated,

Where a petition was presented within twelve months, but no order was made, the Court refused to allow it to stand over for amendment, twelve months having in the meantime expired (*Barwell* v. *Brooks*, 7 Beav. 345; 8 Beav. 121).

an absolute bar to taxation.

The twelve months are an absolute bar to the application if made under the Act (*Re Harper*, 10 Beav. 284; *Re Downes*, 5 Beav. 425; *Binns* v. *Heys*, 13 L. J. Q. B. 28; *Ex parte Hemming*, 28 L. T. 144; *Ex parte Pemberton*, 2 D. M. G. 960); unless, perhaps, actual fraud be shown (*Ex parte Pemberton* (l. c.), per Lord Cranworth); and the rule is the same in the case of an application by a third party or a *cestui que trust* (*Re Massey*, 8 Beav. 458; but see *Re Dawson*, 8 W. R. 554; cited *ante*, p. 23), even though there may have been some agreement between him and the solicitor, or payment be made behind his back (*Re Rees*, 12 Beav. 253).

Laches and acquiescence.

The lapse of less than the twelve months may be an objection to granting the application, *Re Bayley*, 18 Beav. 415; *Re Pugh*, 32 Beav. 173; on appeal, 11 W. R. 762; *Re Browne*, 1 D. M. G. 322; *Re Whicher*, 13 M. & W. 569.

Where a client having fresh advice kept the bill two months in his possession and then paid it, such delay was held by Vice-Chancellor Wood to be fatal to an application for taxation on the ground of overcharge (*Re Foster*, 2 D. F. J. 105. But the Lords Justices being of opinion that the bill was originally paid under circumstances amounting to pressure, reversed the Vice-Chancellor's decision, and ordered taxation of the bill (8 W. R. 620, and see note (*r*), p. 18, *ante*.

Where time does not run against client.

But the Court may order *delivery* of the bill, though more than twelve months have elapsed from its payment, the solicitor having on payment undertaken to deliver the bills, but neglected to do so (*Re Foljambe*, 9 Beav. 402; *Re Bailey*, 34 Beav. 392), *Re Fisher*, 18 Beav. 183.

Re-opening bills of costs by bill.

As to re-opening bills of cost *by bill*, see *Blagrave* v. *Routh*, 2 K. & J. 509; 8 D. M. G. 620; *Foley* v. *Smith*, 12 Beav. 154. In *Turner* v. *Hand*, 27 Beav. 561, a solicitor delivered a general estimate of costs due to him, without specifying the particulars, and the client signed a memorandum agreeing to the statement, and requesting a third person, to whom he had given his acceptances, to pay it; and a bill filed by the client three years afterwards for delivery and taxation was dismissed with costs. See, also, *Todd* v. *Wilson*, 15 L. J. Ch. 450; *Stanes* v. *Parker*, 10 Jur. 603.

Power for taxing officer to request officers of other courts to tax portions of the bill.

XLII. And be it enacted, that in all cases in which such bill shall have been referred to be taxed and settled, the officer to whom such reference is made shall be at liberty to request the proper officer of any other court having such an officer to assist him in taxing and settling

any part of such bill, and such officer so requested shall thereupon proceed to tax and settle the same, and shall have the same powers and may receive the same fees in respect thereof as upon a reference to him by the court of which he is such officer, and shall return the same, with his opinion thereon, to the officer who shall have so requested him to tax and settle the same; and the officer to whom such reference is made shall not be paid any fee for that portion of the bill which shall have been so taxed and settled by the officer of such other court at his request (*h*). 6 & 7 Vict. c. 73, s. 42.

(*h*) See Ord. XL. 1, 35, and notes.

XLIII. And be it enacted, that all applications made under this Act to refer any such bill as aforesaid to be taxed and settled, and for the delivery of such bill, and for the delivering up of deeds, documents, and papers, shall be made in the matter of such attorney or solicitor (*i*) and that upon the taxation and settlement of any such bill the certificate of the officer by whom such bill shall be taxed shall (unless set aside or altered by order, decree, or rule of court (*k*)) be final and conclusive as to the amount thereof, and payment of the amount certified to be due and directed to be paid may be enforced (*l*) according to the course of the court in which such reference shall be made; and in case such reference shall be made in any court of common law, it shall be lawful for such Court or any judge thereof to order judgment (*m*) to be entered up for such amount, with costs, unless the retainer shall be disputed, or to make such other order thereon as such Court or judge shall deem proper. Applications for taxing bill of costs, how to be made. Certificate of taxation to be final. Judgment may be entered.

(*i*) As to the title of the petition, see *Re Vallance*, 8 Scott, N. R. 232; *Re Hair*, *ibid.* 231; *Re Walton*, 4 K. & J. 78. It need not be headed in the matter of the Act (*ibid.*). For form of petition, see Daniell, III. 1711. It must state the time of payment, if presented after payment (*Re Mash*, 15 Beav. 83). Title and form of petition.

(*k*) For the cases on reviewal, see Ord. XL. 35, *post*. Reviewal.

(*l*) An action brought after taxation ordered by a Court of Equity is a contempt (*Re Campbell*, 3 D. M. G. 585); the order may be enforced by attachment (*Lane* v. *Oliver*, 2 Hare, 97; *Re Saull*, 3 N. R. 701; *Re Rey-* Payment how enforced.

6 & 7 Vict. c. 73, s. 43.

nolds, 10 W. R. 709; and see *Re Dendy*, 21 Beav. 565, and cases cited in Seton, 837. And compare note (*u*), p. 20).

(*n*) As to orders for payment of costs operating as judgments under 1 & 2 Vict. c. 110, s. 18, see notes (*d*) and (*e*), *ante*, p. 6.

Meaning of certain words in this Act.

XLVIII. And be it enacted, that in the construction of this Act the word "month" shall be taken to mean a calendar month; and every word importing the singular number only shall extend and be applied to several persons, matters or things, as well as one person, matter, or thing; and every word importing the plural number shall extend and be applied to one person, matter, or thing, as well as several persons, matters, or things; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; and the word "person" shall extend to any body politic, corporate, or collegiate, municipal, civil, or ecclesiastical, aggregate or sole, as well as an individual; unless in any of the cases aforesaid it be otherwise specially provided, or there be something in the subject or context repugnant to such construction.

23 & 24 Vict. c. 127.

The late Act (23 & 24 Vict. c. 127), "to amend the Laws relating to Attornies, Solicitors, Proctors, and Certificated Conveyancers," provides (ss. 27, 28) as follows:—

Interest on costs.

27. Whenever a decree or order is made by the Court of Chancery in which the payment of any costs previously taxed, either in the suit or proceeding in which such decree or order is made, or in any other suit or proceeding is ordered, and whether the certificate of such previous taxation have been made before the passing of this Act, or be made thereafter, it shall be lawful for the Court or judge making such decree or order to order and direct the amount of such costs, as taxed, including the costs of taxation as ascertained by the said certificate, to be paid with interest thereon at the rate of 4*l.* per cent. per annum, from the date of the certificate, the amount of such interest to be verified by affidavit, and to be payable and recoverable out of

the same fund or in the same manner as the amount of such costs (*o*). 23 & 24 Vict. c. 127.

(*o*) See note (*n*) to sect. 47 (last page). In directing payment, out of the purchase-money of the mortgaged property, of a mortgagee's principal, interest, and costs, the Court directed interest to be paid on the costs from the date of the certificate, *Whitfield* v. *Roberts*, 9 W. R. 844. The Act only enables the solicitor, and not a party to the suit, to claim interest on his costs, *Jenner* v. *Morris*, 11 W. R. 943. Orders were made under this section in cases where payment of costs had been unavoidably delayed, *Carter* v. *Carter*, 8 L. T. N. S. 692; *Fox* v. *Charlton*, 6 N. R. 352. Application *by solicitor* for interest on costs.

28. In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the Court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made, such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such Court or judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such Court or judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right: Provided always, that no such order shall be made by any such Court or judge in any case in which the right to recover payment of such costs, Solicitor to have charge for costs on property preserved or recovered.

23 & 24 Vict. c. 127.

charges, and expenses is barred by any Statute of Limitations (*p*).

Solicitor's lien on property recovered.

(*p*) For form of order, see Seton, 858. This section was thought by V.-C. Stuart not to apply to suits instituted on behalf of infants (*Bonser* v. *Bradshaw*, 9 W. R. 229; and see s. c. before Lords Justices, 10 W. R. 481; but see s. c. 4 Giff. 260. This charge only extends to the particular costs of the suit in which the property has been preserved or recovered (*Ex parte Thompson*, 3 L. T. N. S. 317). The claim of a London agent for costs against the country solicitor whose costs have been ordered to be paid out of the fund, is within this section (*Tardrew* v. *Howell*, 3 Giff. 381). Where a solicitor had obtained a foreclosure decree for a client, who afterwards died, though a decree had been made for the administration of his estate, the Court under this section made a charging order on the real estate of the client for the costs of the suit, *Wilson* v. *Round*, 4 Giff. 416. A solicitor may be entitled to this lien on property preserved, though it turns out that his client never had an interest in the fund, *Bailey* v. *Birchall*, 2 H. & M. 371. The solicitor's lien under this section, has priority over all charges created by the client, *Haynes* v. *Cooper*, 33 Beav. 431. See as to solicitor's lien generally, Daniell, 1694, and Morgan & Davey, p. 390.

Priority over charges.

Section 29 is as follows:—

Taxation and payment of deceased lunatic's costs.

In every case in which an attorney or solicitor has been or shall be employed to prosecute or oppose any inquiry whether a person is a lunatic, idiot, or of unsound mind, and incapable of managing himself or his affairs, or in or about any proceedings consequent upon such inquiry, and the costs of such attorney or solicitor have not been paid in the lifetime of such person, it shall be lawful for the Lord High Chancellor or the Lords Justices, or other the person or persons intrusted by Her Majesty with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind, to make such and the like orders and to exercise the like power and authority for taxation of and for raising and payment of such costs after the death of such person as could or might have been exercised or made in his lifetime (*q*); and such orders and proceedings shall be as valid and effective to all intents and purposes as if made in the lifetime of the lunatic: Provided always, that it shall not be lawful for the Court or judge to make any such order but within

six years next after the right to recover such costs, charges, and expenses shall have accrued (*r*). 23 & 24 Vict. c. 127.

(*q*) See 16 & 17 Vict. c. 70 (Lunacy Regulation Act, 1853), s. 145, which provides that costs incurred under the Act may be charged on the lunatic's property. Costs in lunacy.

(*r*) When a lunatic died in June, 1853, and the solicitor in the lunacy—having obtained an order for taxation of his costs in the lunacy matter in February, 1854, and completed such taxation in February, 1855—in October, 1860, presented a petition for an order to charge the lunatic's estate under this section, it was held by L. J. Knight Bruce that the right to recover accrued on the death of the lunatic; and by L. J. Turner that it accrued on the order for taxation being obtained. More than six years having elapsed since either of those periods, the petitioner was held to be barred of all remedy under the concluding proviso of the section (*Ex parte Turner, Re Cumming*, 9 W. R. 213). Within six years.

LANDS CLAUSES CONSOLIDATION ACT.

8 VICT. CAP. 18.

An Act for consolidating in One Act certain Provisions usually inserted in Acts authorising the taking of Lands for Undertakings of a Public Nature. [*8th May*, 1845.

SS. I.—IV.; LXIX.—LXXXVII.

WHEREAS it is expedient to comprise in one general Act sundry provisions usually introduced into Acts of Parliament relative to the acquisition of lands required for undertakings or works of a public nature, and to the compensation to be made for the same, and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings as for ensuring greater uniformity in the provisions themselves: may it therefore please your Majesty that it may be enacted; and be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that this Act shall apply to every undertaking authorised by any Act which shall hereafter be passed, and which shall authorise the purchase or taking of lands for such undertaking, and this 8 Vict. c. 18.

Act to apply to all undertakings authorised by Acts hereafter to be passed.

8 Vict. c. 18, ss. 1—4.

Act shall be incorporated with such Act; and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorised thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act, and be construed together therewith as forming one Act.

Interpretations in this Act:

With respect to the construction of this Act and of Acts to be incorporated therewith, be it enacted as follows:

"Special Act:"

II. The expression "the special Act," used in this Act, shall be construed to mean any Act which shall be hereafter passed which shall authorise the taking of lands for the undertaking to which the same relates, and with which this Act shall be so incorporated as aforesaid; and the word "prescribed," used in this Act in reference to any matter herein stated, shall be construed to refer to such matter as the same shall be prescribed or provided for in the special Act, and the sentence in which such word shall occur shall be construed as if, instead of

"prescribed:"

the word "prescribed," the expression "prescribed for that purpose in the special Act" had been used; and the

"the works:"

expression "the works" or "the undertaking" shall mean the works or undertaking, of whatever nature, which shall by the special Act be authorised to be executed; and the

"Promoters of the undertaking:"

expression "the promoters of the undertaking" shall mean the parties, whether company, undertakers, commissioners, trustees, corporations, or private persons, by the special Act empowered to execute such works or undertaking.

Interpretation in this and the special Act:

III. The following words and expressions, both in this and the special Act, shall have the several meanings hereby assigned to them, unless there be something either in the subject or context repugnant to such construction; (that is to say,)

Number:

Words importing the singular number only shall include the plural number, and words importing the plural number only shall include the singular number:

Words importing the masculine gender only shall include females: 8 Vict. c. 18, ss. 1—4.

Gender:

The word "lands" shall extend to messuages, lands, tenements, and hereditaments of any tenure: "Lands:"

The word "lease" shall include an agreement for a lease: "Lease:"

The word "month" shall mean calendar month: "Month:"

The expression "superior courts" shall mean Her Majesty's superior Courts of Record at Westminster or Dublin, as the case may require: "Superior Courts:"

The word "oath" shall include affirmation in the case of Quakers, or other declaration lawfully substituted for an oath in the case of any other persons exempted by law from the necessity of taking an oath: "Oath:"

The word "county" shall include any riding or other like division of a county, and shall also include county of a city or county of a town: "County:"

The word "sheriff" shall include under-sheriff, or other legally competent deputy; and where any matter in relation to any lands is required to be done by any sheriff or by any clerk of the peace, the expression "the sheriff," or the expression "the clerk of the peace," shall in such case be construed to mean the sheriff or the clerk of the peace of the county, city, borough, liberty, cinque port, or place where such lands shall be situate; and if the lands in question, being the property of one and the same party, be situate not wholly in one county, city, borough, liberty, cinque port, or place, the same expression shall be construed to mean the sheriff or clerk of the peace of any county, city, borough, liberty, cinque port, or place, where any part of such lands shall be situate: "the Sheriff:" "the Clerk of the Peace:"

The word "justices" shall mean justices of the peace acting for the county, city, liberty, cinque port, or place where the matter requiring the cognizance of any such justice shall arise, and who shall not be interested in the matter; and where such matter shall arise in respect of lands being the property of "Justices:"

8 Vict. c. 18, ss. 1—4.

one and the same party, situate not only in any one county, city, borough, liberty, cinque port, or place, the same shall mean a justice acting for the county, city, borough, liberty, cinque port, or place where any part of such lands shall be situate, and who shall not be interested in such matter; and where any matter shall be authorised or required to be done by two justices, the expression "two justices" shall be understood to mean two justices assembled and acting together:

"Two Justices:"

Where under the provisions of this or the special Act, or any Act incorporated therewith, any notice shall be required to be given to the owner of any lands, or where any act shall be authorised or required to be done with the consent of any such owner, the word "owner" (*a*) shall be understood to mean any person or corporation who, under the provisions of this or the special Act, would be enabled to sell and convey lands to the promoters of the undertaking.

"Owner:"

"The Bank:"

The expression "the Bank" shall mean the Bank of England where the same shall relate to monies to be paid or deposited in respect of land situate in England, and shall mean the Bank of Ireland where the same shall relate to monies to be paid or deposited in respect of lands situate in Ireland.

"Owner:"

(*a*) As to the meaning of the word "owner" in the Act, see *post*, note (*u*) to s. 76, p. 43.

Short title of the Act.

IV. And be it enacted, that in citing this Act in other Acts of Parliament, and in legal instruments, it shall be sufficient to use the expression "The Lands Clauses Consolidation Act, 1845."

And with respect to the purchase-money or compensation coming to parties having limited interests, or prevented from treating, or not making title, be it enacted as follows:

Purchase-money payable to parties under

LXIX. (*b*) If the purchase-money or compensation which shall be payable in respect of any lands or any

interest therein, purchased or taken by the promoters of the undertaking from any corporation, tenant for life or in tail, married woman seised in her own right or entitled to dower, guardian, committee of lunatic or idiot, trustee, executor, or administrator, or person having a partial or qualified interest only in such lands, and not entitled to sell or convey the same except under the provisions of this or the special Act, or the compensation to be paid for any permanent damage to any such lands, amount to or exceed the sum of two hundred pounds (*c*), the same shall be paid (*d*) into the Bank, in the name and with the privity of the Accountant-General of the Court of Chancery in England if the same relate to lands in England or Wales, or the Accountant-General of the Court of Exchequer in Ireland if the same relate to lands in Ireland, to be placed to the account there of such Accountant-General *ex parte* the promoters of the undertaking (describing them by their proper name), in the matter of the special Act (citing it), pursuant to the method prescribed by any Act for the time being in force for regulating monies paid into the said courts; and such monies shall remain so deposited until the same be applied to some one or more of the following purposes; (that is to say),

8 Vict. c. 18, s. 69.

disability amounting to 200*l.* to be deposited in the Bank.

Application of monies deposited.

In the purchase or redemption of the land tax (*e*) or the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts, or purposes (*f*); or

In the purchase of other lands, to be conveyed, limited, and settled upon the like uses, trusts, and purposes, and in the same manner, as the lands in respect of which such money shall have been paid stood settled (*g*); or

If such money shall be paid in respect of any buildings taken under the authority of this or the special Act, or injured by the proximity of the works, in removing or replacing such buildings, or substituting others in

8 Vict. c. 18, s. 69.

their stead, in such manner as the Court of Chancery shall direct; or

In payment to any party becoming absolutely entitled to such money (*h*).

Purchase-money over 200*l.*

(*b*) Where the company, instead of paying the purchase-money of lands belonging unto a corporation into court under this section, paid it to the vendors, the latter were, on motion, ordered to pay it into court for the purpose of interim protection (*London and North-Western Railway Company* v. *Corporation of Lancaster*, 15 Beav. 22).

Under this section not converted into personalty.

The purchase-money paid into court under these sections, is to be laid out in purchase of realty, and therefore remains impressed with the character of realty, *Re Harrop*, 3 Drew. 726; *Re Bagot*, 10 W. R. 607; *secus* where the land is taken under section 76. See note (*x*) to section 78, *post*, p. 45, and 1 Wh. & Tud. L. Cases, 775; *Re Stewart*, 1 Sm. & G. 32; *Midland Railway Company* v. *Oswin*, 1 Coll. 80; *Dixie* v. *Wright*, 32 Beav. 662, where accumulations of dividends on a fund paid in under this section, the fund having been forgotten, were held to pass under a will as personalty, *Re Skegg*, 13 W. R. 567. But see *Re Manchester and Southport Railway Company*, 19 Beav. 365.

Instalments under 200*l.*

(*c*) When 250*l.* had been originally paid in by the company under section 85, and the purchase-money was subsequently fixed by arbitration at 300*l.*, the surplus 50*l.* was ordered to be paid to the same account as the 250*l.*, and the whole 300*l.* to be invested (*Ex parte London, Tilbury, and Southend Railway Company*, 1 W. R. 533).

Interest *not* payable by company.

(*d*) As soon as the money is paid into the Bank, interest ceases to be payable by the company (*Lewis* v. *South Wales Railway Company*, 10 Hare, 113; comp. *Re Divers*, 1 Jur. N. S. 995). In *Ex parte Earl of Hardwicke*, 1 D. M. G. 297, where the company were ordered to pay interest, it was by consent agreed that no objection should be taken for want of jurisdiction, but that the question should be decided as if a bill had been filed. See *Chambers* v. *White*, 14 Jur. 1129.

Money applied in—

(1) Redeeming land tax.

(*e*) For form of order for redemption of land-tax, see Seton, 1063. A tenant for life, who has redeemed the land-tax, will, it seems, be allowed to reimburse himself out of the purchase-monies paid into court (*Ex parte Northwick*, 1 Y. & Coll. Exch. Rep. 166). See as to the costs, *post*, p. 49.

(2) Discharging incumbrances.

(3) Enfranchising copyholds.

(4) Buying out lessee.

(5) Improving and repairing buildings,

(*f*) The following applications of purchase-money have been held to be within this section, as equivalent to discharges of incumbrances or otherwise.

The enfranchisement of other copyholds belonging to the vendors, *Dixon* v. *Jackson*, 25 L. J. Ch. 588; *Re Cheshunt College*, 3 W. R. 638. See Seton, 1067.

Purchasing a lessee's interest, *Ex parte Corporation of Sheffield*, 21 Beav. 162; or redeeming a quit rent, *Ex parte Studdert*, 6 Ir. Ch. Rep. 53.

Effecting permanent improvements, *e.g.*, drainage of glebe lands, *Re Vicar of Queen-Camel*, 11 W. R. 503, especially if the vendor has power to create a charge for such improvements, *Re Lathropp's Charity*, 1 L. R. Eq. 467; *Ex parte Lockwood*, 14 Beav. 158. Rebuilding old houses, or erecting new ones, *Ex parte Shaw*, 4 Y. & Coll. 506; *Re Hichen*, 1 W. R. 505; *Re Wigan Glebe Act*, 3 W. R. 41; *Re Wright's Devisees*, 6 W. R. 718; *Ex parte Barrett*, 15 Jur. 3; *Re Chelsea Waterworks Company*, 28 L. J. 173; *Re Davis*, 3 De G. & J. 144; *Re Dummer's Will*, 2 De G. & S. 515; *Re Partington*, 1 N. R. 177; *Re St. Thomas's Hospital*, 11 W. R. 1018; *Re Kent Coast Railway*, 10 W. R. 505; *e.g.*, building a new parsonage house, *Re Incumbent of Whitfield*, 1 J. & H. 610.

if such building is very beneficial.

But it must be shown that the application of money in building will be very beneficial to the objects of the trust, *Ex parte Corporation of Liverpool*, 14 W. R. 906, where a petition for such application was refused, and see *Re Rudyerd's Estate*, 2 Giff. 394.

Costs.

As to costs of petitions for application of the money in discharge of incumbrances, and of the consequent proceedings, see page 49, note(*f*).

8 Vict. c. 18, s. 69.

(*g*) In *Ex parte Bishop of London*, 2 D. F. J. 14, the buying up a lease of other land belonging to the see was held equivalent to a purchase of freehold within this clause (see last note). And the Court allowed the purchase-money of leaseholds to be invested in the purchase of a reversion in fee of other leaseholds belonging to the same parties (*Re Brasher's Trusts*, 6 W. R. 406). See, also, *Re the Liverpool Docks Act*, 1 Sim. N. S. 202, where such purchase-monies were ordered to be laid out in the purchase of copyholds of inheritance, but generally the purchase-monies of copyholds and freeholds cannot be laid out in the purchase of leaseholds (*Ex parte Macaulay*, 2 W. R. 667). Under special circumstances, however, the reinvestment of the purchase-monies of freeholds, copyholds, and leaseholds, in the purchase of copyholds of inheritance, has been permitted (*Re Brown*, 6 Rly. Ca. 733); and see *Re Cann's Estate*, 15 Jur. 3, Seton, 1065. And as to the evidence required, see *Re Kinsey*, 1 N. R. 303; and as to the costs in case of copyholds, see *Ex parte Vicar of Sauston*, cited in note (*f*), p. 49, *post*.

Money reinvested in—

(6) Purchase of leasehold and copyholds.

Where an advantageous opportunity offers itself for the investment of the monies paid in, together with other trust-monies, in the purchase of estates of greater value, the Court will sanction such investment (*Ex parte Newton*, 4 Y. & Coll. Exch. Rep. 518). See as to the extra costs in such a case, *post*, note (*c*), p. 48.

Purchase of estates of greater value. Costs.

On application for reinvestment, the Court *formerly* in the first instance approved the value and form of investment, and postponed any further order till the opinion of the conveyancing counsel of the Court (see 15 & 16 Vict. c. 80, sect. 40) was obtained on the title, *Re Martin*, 17 Jur. 30; *Ex parte Churchwardens of Bicester*, 5 Rly. Ca. 205; *Ex parte Bouverie*, *ibid.* 431. But in *Re Hichin's Estate*, 1 W. R. 505, a prospective order was made for reinvestment in land of the money paid in, on the certificate of the chief clerk that the title had been approved and the conveyance executed. See *Re Hilton*, 14 L. T. N. S. 129, and see note to 19 & 20 Vict. c. 120, s. 11, *post*, and the modern forms of order for reinvestment in land in Seton, 1064; 10 Hare, App. xxxvi.

Reference to conveyancing counsel.

Prospective order.

As to the costs see note (*f*), p. 49, and as to abortive attempts to reinvest, see note (*i*), p. 52.

(*h*) The petition for payment out of the purchase-money, must be accompanied by an affidavit of no incumbrances. See Ord. XXXIV. 3, and notes, and see *Ex parte Grange*, 3 Y. & Coll. 62; *Ex parte Hollick*, 4 Rly. Ca. 498, and (in the case of married women) of no settlement, Ord. I. 1.

(7) Payment out to party entitled,

As to payment out to representatives of deceased persons, see Ord. I. 4—9, and *Ex parte Flamank*, 1 Sim. N. S. 260.

to representatives of deceased persons,

The Court has refused to direct payment out to trustees for parties beneficially entitled (*Re Horwood*, 3 Giff. 218, decided under sec. 78), and see *Re Roberts*, 9 W. R. 758; but as to payment out of smalls sum to solicitors on their undertaking to distribute them, see Aycb. 456, and for order to pay out to trustees, "or either of them," see note (*m*), p. 39.

to trustees and solicitors,

Where the land taken was entailed, the purchase-money, may be paid out to the tenant in tail without a disentailing deed, *Sowry* v. *Sowry*, 8 W. R. 339, where the money was under 200*l.*; *Re South Eastern Railway Company*, 30 Beav. 215, where it was 1000*l.*; and see *Re Tyler*, 8 W. R. 540; *Re Holden*, 1 H. & M. 445; *Notley* v. *Palmer*, 1 L. R. Eq. 241; *Ex parte Earl Abergavenny*, 19 Beav. 153; and where the tenant for life was lunatic, the money was allowed to be laid out on permanent improvements, without requiring the remainderman to execute a disentailing deed, *Re Watson*, 10 Jur. N. S. 1011; and see generally as to election by tenant in tail, Lewin, 692.

to tenant in tail without disentailing deed;

Where the land taken belonged to a married woman, the purchase-money, may be paid to her upon her consent being taken in court (see *Gibbons* v. *Kibbey*, 10 W. R. 55), without an acknowledged deed, *Re Hayes*, 9 W. R. 763; *Re Worthington*, cited Seton, 660; *Re Tyler*, L. C.; *Re Clarke*, 13 W. R. 401; and as to payment out to married women generally, see Aycb. 466; and as to the course where money under 200*l.* is ordered to be paid out to women who afterwards marry, see Ord. I. 1—3, *post*.

to married woman without deed.

As to serving incumbrancers, &c., see note (*g*), pp. 50, 51.

For the practice as to paying out, see further, Ord. I., note (*a*), *post*.

8 Vict. c. 18, s. 70.

Order for application and investment meanwhile.

LXX. Such money may be so applied as aforesaid upon an order of the Court of Chancery in England or the Court of Exchequer in Ireland, made on the petition (*i*) of the party who would have been entitled to the rents and profits of the lands in respect of which such money shall have been deposited; and until the money can be so applied it may, upon the like order, be invested by the said Accountant-General in the purchase of three per centum consolidated or three per centum reduced bank annuities, or in government or real securities (*j*), and the interest, dividends, and annual proceeds thereof (*k*) paid to the party who would for the time being have been entitled to the rents and profits of the land (*l*).

Applications for interim investment, how made.

(*i*) Ord. XXXV. 1, *post*, as to making applications in chambers for sums in court under 300*l*., does not apply to monies paid in under this Act (*Re Clarke's Devisees*, 6 W. R. 812). But see *Re the Dunraven Estates*, 10 W. R. 56; where it was held that a petition for reinvestment may be amended at the hearing by asking that the balance may be invested in purchases to be approved by the judge in chambers.

When refused.

(*j*) Notwithstanding these words, the Court refused to sanction an *interim* investment in mortgage security, the master having reported against it (*Ex parte Franklyn*, 1 De G. & Sm. 528); and as to the costs of interim investments, see *post*, note (*i*), p. 52.

Dividends paid to party entitled, before conveyance.

(*k*) Where the company are in possession, payment of the dividends to the tenant for life will be ordered before the conveyance (*Re Hungerford's Trusts*, 1 K. & J. 413). It is not the duty of the Court to go into the title of the person claiming. See sect. 79, *post*, p. 45.

Corporation "for time being entitled."

As to the form of an order under this section in the case of a corporation sole, see *Ex parte the Archbishop of Canterbury*, 2 De G. & Sm. 365; and comp. *Re Davenant's Charity*, 2 W. R. 344, and *Ex parte Churchwarden and Overseers of Bicester*, 5 Rly. Ca. 702, where the dividends were ordered to be paid "to the vicar for the time being, and churchwardens and overseer, or either of them." See the cases on the respective interests of lessors and lessees in note to sect. 74, *infra*.

Who may apply for interim investment as "party entitled to rents and profits."

(*l*) It seems that the Court has not power to proceed under this section at the instance of an incumbrancer, *ex. gr.*, an annuitant, but only at the instance of the person who would have been entitled to the rents and profits if the property had been unsold (*Ex parte Back*, 2 You. & Jer. 386; and see *Re Hungerford*, 3 K. & J. 455). So in *Ex parte Cofield*, 11 Jur. 1071, the dividends were paid to the owner, though the land was subject to an annuity. See *Ex parte Wilkinson*, 3 De G. & S. 633. In *Re Pedley's Estate*, 1 Jur. N. S. 654, an order was made on the petition of the tenant for life, and annuitants (not bound by the contract) for payment of the dividends to the former, prefaced by an undertaking not to distrain on the lands. Compare cases on the concluding words of sect. 78, *post*, note (*w*), page 45.

Sums from 20*l*. to 200*l*. to be deposited or paid to trustees.

LXXI. If the purchase-money or compensation shall not amount to the sum of two hundred pounds and shall exceed the sum of twenty pounds, the same shall either be paid into the Bank, and applied in the manner herein-

before directed with respect to sums amounting to or exceeding two hundred pounds, or the same may lawfully be paid to two trustees (*m*), to be nominated by the parties entitled to the rents or profits of the lands in respect whereof the same shall be payable, such nomination to be signified by writing under the hands of the party so entitled; and in case of the coverture, infancy, lunacy, or other incapacity of the parties entitled to such monies, such nomination may lawfully be made by their respective husbands, guardians, committees, or trustees; but such last-mentioned application of the monies shall not be made unless the promoters of the undertaking approve thereof and of the trustees named for the purpose; and the money so paid to such trustees, and the produce arising therefrom, shall be by such trustees applied in the manner hereinbefore directed with respect to money paid into the Bank, but it shall not be necessary to obtain any order of the Court for that purpose. 8 Vict. c. 18, s. 71.

(*m*) Where the land taken had been vested in trustees under the Municipal Corporation Acts, the Court, under this section, ordered payment of the dividends of the investment to any two of the trustees for the time being (*Re Collins' Charity*, 29 L. J. Ch. 168). In *Re Clinton*, 8 W. R. 492, V.-C. Wood, after consulting with the Registrars, made the order for payment to the two trustees "or either of them." The proceeds of the sale of charity lands taken by a railway company cannot be paid to the trustees of the charity, without the consent of the Charity Commissioners (*Re Faversham Charities*, 10 W. R. 291). Payment to trustees for time being, one of two trustees &c. Charity Trustees.

LXXII. If such money shall not exceed the sum of twenty pounds (*n*), the same shall be paid to the parties entitled to the rents and profits of the lands in respect whereof the same shall be payable, for their own use and benefit, or in case of the coverture, infancy, idiotcy, lunacy, or other incapacity of any such parties, then such money shall be paid for their use to the respective husbands, guardians, committees, or trustees of such persons. Sums not exceeding 20*l.* to be paid to parties.

(*n*) Where it is probable that after payment of part of the sum paid in, the balance left will be under 20*l.*, the Court will order that the balance, *if less than* 20*l.*, be paid to the tenant for life (*Re Egremont*, 12 Jur. 618; *Re Bateman's Estate*, 21 L. J. Ch. 691). But see *Ex parte Vicar of Bredicot*, 5 Rly. Ca. 209, where the Court refused to order payment of 20*l.* 10*s.* (the balance of 200*l.* paid into court for the purchase of land belonging to a rectory) to the rector in liquidation of extra costs beyond those allowed by the Act; and in *Re Bateman*, 21 L. J. Ch. 691, and *Ex parte Barrett*, *ibid.*, 415, Purchase-money under 20*l.*

8 Vict. c. 18, s. 72.

applications to allow sums over 20*l.* to be paid to the tenant for life, he undertaking to lay them out in lasting improvements, were refused. See Seton, 1082.

All sums payable under contract with persons not absolutely entitled to be paid into Bank.

LXXIII. All sums of money exceeding twenty pounds which may be payable by the promoters of the undertaking in respect of the taking, using, or interfering with any lands, under a contract or agreement with any person (*o*) who shall not be entitled to dispose of such lands or of the interest therein contracted to be sold by him absolutely for his own benefit, shall be paid into the Bank or to trustees in manner aforesaid; and it shall not be lawful for any *contracting party* not entitled as aforesaid to retain to his own use any portion of the sums so agreed or contracted to be paid for or in respect of the taking, using, or interfering with any such lands, or in lieu of bridges, tunnels, or other accommodation works, or for assenting to or not opposing the passing of the bill (*o*) authorising the taking of such lands, but all such monies shall be deemed to have been contracted to be paid for and on account of the several parties interested in such lands, as well in possession as in remainder, reversion, or expectancy: Provided always, that it shall be in the discretion of the Court of Chancery in England, or the Court of Exchequer in Ireland, or the said trustees, as the case may be, to allot to any tenant for life or for any other partial or qualified estate, for his own use, a portion of the sum so paid into the Bank or to such trustees as aforesaid, as compensation for any injury, inconvenience, or annoyance which he may be considered to sustain, independently of the actual value of the lands to be taken, and of the damage occasioned to the lands held therewith, by reason of the taking of such lands and the making of the works (*p*).

Section applies though no contract.

(*o*) These words were held to apply to the case of a landowner withdrawing his opposition to the bill authorising a railway, though he never entered into any contract as to the land eventually taken under such Act, and though the section in terms only speaks of a "contracting party," *Pole* v. *Pole*, 2 Dr. & Sm. 420.

What monies are within the section.

(*p*) The costs of an arbitration submitted to at the instance of a tenant for life, but which resulted in an award less than the amount originally offered by the company, were under this section ordered to be paid to the tenant for life, out of the purchase-money paid in (*Re Aubrey's Estates*, 1 W. R. 464).

Small sums ordered to be

Under this section small sums will be ordered to be paid to the tenant for life, for his own use, as compensation for "injury, inconvenience, and annoy-

ance," sustained by him, see Seton, 1068, 1071, 1082 (*Ex parte Lockwood*, 14 Beav. 158, note; *Ex parte the Rector of Little Steeping*, 5 Rly. Ca. 207). But see *Re Duke of Marlborough's Estates*, 13 Jur. 738, where a company having agreed with a tenant for life, to pay him a sum for the benefit of himself, "or other the owner for the time being, for indemnifying him from the expenses of making a new road, &c., and as a compensation for the annoyance which he, or such owners as aforesaid, might sustain, in consequence of the construction of such railway," the Court ordered the purchase-monies after payment of the costs for making the road, to be invested, and refused to pay them to the tenant for life.

8 Vict. c. 18, s. 73.

paid to tenant for life.

It was held that upon a reference to the master, under the old practice, to inquire as to the title to money paid in for compensation for damage done to lands, the master ought to report whether the damage done be temporary or permanent (*Cator* v. *Croydon Canal Company*, 4 Y. & Coll. Exch. Rep. 405).

Damage.

LXXIV. Where any purchase-money or compensation paid into the Bank under the provisions of this or the special Act shall have been paid in respect of any lease for a life or lives or years, or for a life or lives and years, or any estate in lands less than the whole fee simple thereof, or of any reversion dependent on any such lease or estate, it shall be lawful for the Court of Chancery in England or the Court of Exchequer in Ireland, on the petition of any party interested in such money, to order that the same shall be laid out, invested, accumulated, and paid in such manner as the said Court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate, or reversion in respect of which such money shall have been paid, or as near thereto as may be (*q*).

Court of Chancery may direct application of money in respect of leases or reversions as they may think just.

(*q*) "Lease" includes an agreement for a lease (sect. 3).

Apportionment—

As to apportionment between lessor and lessee, where there is a doubt on the title of either, see *Brandon* v. *Brandon*, cited in note to sect. 79, *post*, p. 46. A yearly tenant holding over after notice to quit, can claim no compensation, *Ex parte Nadin*, 17 L. J. Ch. 421. Lessors and lessees should deal separately with the company in respect of their interests, for the Court has no jurisdiction to apportion the capital of the purchase-money between them, *Ex parte Ward*, 2 De G. & S. 4.

(1) As between lessor and lessee.

When property *held under a lease* is taken, so that the present income of the purchase-money is less than the annual profits of the land, it often becomes a question between a tenant for life and remainderman how the purchase-money is to be divided. The tenant for life was allowed the full income he received before the sale in *Jeffreyes* v. *Connor*, 28 Beav. 328, and the same was held with respect to an annuitant in *Ex parte Wilkinson*, 3 De G. & M. 633; but see *Re Birch*, 10 Jur. N. S. 673. In *Re Money*, 2 Dr. & Sm. 94, the entire purchase-money was divided by the number of years the lease had to run, and a portion paid each year to the tenant for life; but this case was disapproved of, and the proportions referred to an actuary, in *Re Chamberlain*, 10 Sol. Jour. 910.

(2) As between successive owners.

(*α*) Where the property taken was *held on lease*, and therefore of perishable nature.

On the other hand, where property *let on a lease* at a low rent renewable on fines is taken, the present income of the purchase-money will far exceed the

(*β*) where it was *let* on leases

8 Vict. c. 18, s. 74.

rent reserved, and in such cases, where the land taken belongs to ecclesiastical corporations, the Court generally allows the persons entitled in possession so much of the dividends of the purchase-money as corresponds with the amount they would have received if the land were unconverted, and directs the surplus to be accumulated and invested, with liberty to apply at the periods when the leases would be renewable and the fines payable, *Ex parte Dean of Gloucester*, 19 L. J. Ch. 400; *Ex parte Dean of Christchurch*, 23 L. J. Ch. 149; *Ex parte Vicar of Lambeth*, 4 Rly. Ca. 231; *Ex parte Bishop of Winchester*, 10 Hare, 137; *Ex parte Precentor of St. Paul's*, 1 K. & J. 538; but where such land was private property, the tenant for life was held entitled to the whole dividends, *Re Steward*, 1 Drew. 636, and see *Re Beaufoy*, 1 Sm. & G. 20, and compare *Re Dean of Westminster*, 26 Beav. 214.

renewable on fines.

Ecclesiastical leaseholds.

Private property.

Upon deposit being made the owners of the lands to convey, or in default the lands to vest in the promoters of the undertaking, upon deed poll being executed.

LXXV. Upon deposit in the Bank in manner hereinbefore provided of the purchase-money or compensation agreed or awarded to be paid in respect of any lands purchased or taken by the promoters of the undertaking under the provisions of this or the special Act, or any Act incorporated therewith, the owner (*r*) of such lands, including in such term all parties by this Act enabled to sell or convey lands, shall, when required so to do by the promoters of the undertaking, duly convey such lands to the promoters of the undertaking, or as they shall direct; and in default thereof (*s*), or if he fail to adduce a good title to such lands to their satisfaction, it shall be lawful for the promoters of the undertaking, if they think fit, to execute a deed poll under their common seal if they be a corporation, or if they be not a corporation under the hand and seals of the promoters or any two of them, containing a description of the lands in respect of which such default shall be made, and reciting the purchase or taking thereof by the promoters of the undertaking, and the names of the parties from whom the same were purchased or taken, and the deposit made in respect thereof, and declaring the fact of such default having been made; and such deed poll shall be stamped with the stamp duty which would have been made payable upon a conveyance to the promoters of the undertaking of the lands described therein; and thereupon all the estate and interest in such lands of or capable of being sold and conveyed by the party between whom and the promoters of the undertaking such agreement shall have been come to, or as between whom and the promoters of

the undertaking such purchase-money or compensation shall have been determined by a jury or by arbitrators, or by a surveyor appointed by two justices, as herein provided, and shall have been deposited as aforesaid, shall vest absolutely in the promoters of the undertaking, and as against such parties, and all parties on behalf of whom they are hereinbefore enabled to sell and convey, the promoters of the undertaking shall be entitled to immediate possession of such lands (*t*). 8 Vict. c. 18, s. 75.

(*r*) As to the meaning of "owner," see next section and note.

(*s*) See, before the passing of the Act, *Bruce* v. *Willis*, 11 Ad. & Ell. 463; *The Earl of Harborough* v. *Shardlow*, 2 Rly. Ca. 253; 7 M. & W. 87.

(*t*) The lands vest without a conveyance (*Bruce* v. *Willis*, 11 Ad. & Ell. 463; s. c. *sub. nom. Bath River Company* v. *Willis*, 2 Rly. Ca. 7). Vesting.

LXXVI. If the owner (*u*) of any such lands purchased or taken by the promoters of the undertaking, or of any interest therein, on tender of the purchase-money or compensation either agreed or awarded to be paid in respect thereof, refuse to accept the same, or neglect or fail to make out a title to such lands, or to the interest therein claimed by him, to the satisfaction of the promoters of the undertaking, or if he refuse to convey or release such lands as directed by the promoters of the undertaking, or if any such owner be absent from the kingdom, or cannot after diligent inquiry be found, or fail to appear on the inquiry before a jury, as herein provided for, it shall be lawful for the promoters of the undertaking to deposit the purchase-money or compensation payable in respect of such lands, or any interest therein, in the Bank, in the name and with the privity of the Accountant-General of the Court of Chancery in England or the Court of Exchequer in Ireland, to be placed, except in the cases herein otherwise provided for, to his account there, to the credit of the parties interested in such lands (describing them, so far as the promoters of the undertaking can do), subject to the control and disposition of the said Court. Where parties refuse to convey, or do not show title, or cannot be found, the purchase-money to be deposited.

(*u*) A person in possession, but showing a bad title, is not "an owner" within this section; and therefore, where a vendor under a contract for a Who is "owner."

8 Vict. c. 18, s. 76.

sixty years' title, fails to show more than a title for thirty-six years, he cannot compel the company to deposit the purchase-money in the Bank under this section (*Douglas* v. *London and North-Western Railway Company*, 3 K. & J. 173; and see *Ex parte Freemen and Stallingers of Sunderland*, 1 Drew. 184; *Doe* d. *Hutchinson* v. *Manchester, Bury, and Rosendale Railway Company*, 14 M. & W. 687; 3 Rly. Ca. 748). But a surviving partner selling the property by virtue of his duty to wind up the partnership, is an owner within the section (*Douglas* v. *London and North-Western Railway Company*, l. c.). Comp. as to the meaning of the word owner, *Russell* v. *Shenton*, 3 Q. B. 449; *Chauntler* v. *Robinson*, 4 Exch. 163.

Who is "owner."

Upon deposit being made a receipt to be given, and the lands to vest upon a deed poll being executed.

LXXVII. Upon any such deposit of money as last aforesaid being made, the cashier of the Bank shall give to the promoters of the undertaking, or to the party paying in such money by their direction, a receipt for such money, specifying therein for what and for whose use (described as aforesaid) the same shall have been received, and in respect of what purchase the same shall have been paid in; and it shall be lawful for the promoters of the undertaking, if they think fit, to execute a deed poll, under their common seal, if they be a corporation, or if they be not a corporation under the hands and seals of the said promoters or any two of them, containing a description of the lands in respect whereof such deposit shall have been made, and declaring the circumstances under which and the names of the parties to whose credit such deposit shall have been made, and such deed poll shall be stamped with the stamp duty which would have been payable upon a conveyance to the promoters of the undertaking of the lands described therein; and thereupon all the estate and interest in such lands of the parties for whose use and in respect whereof such purchase-money or compensation shall have been deposited shall vest absolutely in the promoters of the undertaking, and as against such parties they shall be entitled to immediate possession of such lands.

Application of monies so deposited.

LXXVIII. Upon the application by petition or any party making claim to the money so deposited as last aforesaid, or any part thereof, or to the lands in respect whereof the same shall have been deposited, or any part of such lands, or any interest in the same, the said Court of Chancery in England or the Court of Exchequer in Ireland may, in a summary way, as to such Court shall

seem fit, order such money to be laid out or invested in the public funds, or may order distribution thereof, or payment of the dividends thereof (*v*) according to the respective estates, titles, or interests of the parties making claim to such money or lands, or any part thereof (*w*), and may make such other order in the premises as to such Court shall seem fit (*x*). 8 Vict. c. 18, s. 78.

(*v*) See note to sect. 69, *ante*, as to payment of money out of court, and notes to sect. 70 as to investment. Payment out.

When the money is once ordered to be invested, the company will not be allowed any option as to the fund in which, or the time at which the investment is to be made, *Re Newport, &c. Railway*, 11 Jur. 160. Investment.

(*w*) Compare note on the concluding words of section 70, p. 38. It was held by the Lords Justices in *Re Marriage*, 9 W. R. 843, overruling s. c. *ibid.* 777, that under this section incumbrancers may petition for the money to be paid to them out of court, without prejudice to any question between them and the landowner. Parties making claim.

(*x*) It is decided that purchase-money in court under this section, is converted into personalty, *Ex parte Flamank*, 1 Sim. N. S. 260; *Ex parte Harrop*, 3 Drew. 726, 733; White & Tudor, Leading Cases 1, 776, and see note (*b*) to sect. 69, *ante*, p. 36. Conversion into personalty.

LXXIX. If any question arise respecting the title to the lands in respect whereof such monies shall have been so paid or deposited as aforesaid, the parties respectively in possession of such lands, as being the owners thereof, or in receipt of the rents of such lands, as being entitled thereto at the time of such lands being purchased or taken, shall be deemed to have been lawfully entitled to such lands until the contrary be shown to the satisfaction of the Court; and unless the contrary be shown as aforesaid, the parties so in possession, and all parties claiming under them, or consistently with their possession, shall be deemed entitled to the money so deposited, and to the dividends or interest of the annuities or securities purchased therewith, and the same shall be paid and applied accordingly (*y*). Party in possession to be deemed the owner.

(*y*) The legislature has anxiously provided that "The Court shall not upon the occasion of applications for payment of purchase-money, deal with the property in any way which can affect the title, unless it can be shown so clearly as to be beyond all question, that there must be litigation upon the question of title." Per V.-C. Wood in *Re St. Pancras Burial Ground*, 3 L. R. Eq. 173, 183; and compare *Re Perry's* or *Sterry's Estate*, 3 W. R. 561; 1 Jur. N. S. 917; *Re Alston*, 5 W. R. 189. When the Court will refuse to investigate title of party in possession.

But where the title is proved to be doubtful, the Court is bound to try the question, as formerly it would have directed an issue at law, see *Ex parte Issauchaud*, 3 Y. & Coll. Exch. 721; *Ex parte the Freemen, &c. of Sunderland*, 1 Drew. 184; see Sir John Rolt's Act, *post*, and a jury in trying such question What rights will be determined. 25 & 26 Vict. c. 42.

8 Vict. c. 79, s. 79.

ought not to deem the party in possession the owner under this section, which "was intended only as a direction to the Court, how it should act in cases where upon application for money deposited it should be unable to arrive at a satisfactory conclusion as to what parties were lawfully entitled to the land." Per V.-C. Kindersley, *ibid.*, 16 Jur. 371. Where successive interests are claimed, and there is a dispute whether one of the claimants is really entitled, the Court will apply its ordinary machinery to ascertain the respective values of the particular interests, and after paying the amount of the value of the interests as to which there is no doubt to the parties entitled, will return the remainder of the money to the company, *Brandon* v. *Brandon*, 2 Dr. & Sm. 305; *Re N. London Railway Company*, *ibid.* 312; *Re Perks*, 1 Sm. & Giff. 545.

Where title to *part* is disputed.

Costs in cases of money deposited.

LXXX. (*z*) In all cases of monies deposited in the Bank under the provisions of this or the special Act or an Act incorporated therewith (*a*), except where such monies shall have been so deposited by reason of the wilful refusal (*b*) of any party entitled thereto to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required, it shall be lawful for the Court of Chancery in England or the Court of Exchequer in Ireland to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto (*c*) to be paid by the promoters of the undertaking (*d*) (that is to say), the costs of the purchase or taking of the lands or which shall have been incurred in consequence thereof (*e*) other than such costs as are herein otherwise provided for, and the costs of the investments of such monies in government or real securities, and of the reinvestment (*f*) thereof in the purchase of other lands, and also the costs of obtaining the proper orders for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the securities upon which such monies shall be invested, and for the payment out of court of the principal of such monies or of the securities whereon the same shall be invested, and of all proceedings relating thereto (*g*) except such as are occasioned by litigation between adverse claimants (*h*): Provided always, that the costs of one application only for reinvestment in land shall be allowed, unless it shall appear to the Court of Chancery in England or the Court of Exchequer in Ireland, that it is for the benefit of the parties interested in the said monies

that the same should be invested in the purchase of lands in different sums and at different times, in which case it shall be lawful for the Court, if it think fit, to order the costs of any such investments to be paid by the promoters of the undertaking (*i*). 8 Vict. c. 18, s. 80.

(*z*) For form of order under this section, see Seton, 1072. Order for payment of *costs according to the Act.*

As the section applies to cases where the company uses its *compulsory* powers either under the preceding sections, or under sect. 85, (*post*), see *Ex parte Flower*, 1 L. R. Ch. 599, the Court inclines in doubtful cases under it, to make the company pay the costs, *Ex parte Marshall*, 1 Phill. 560.

But as to *unreasonable* costs, see note (*c*).

The costs payable by the company (or *companies* see note (*d*)) may be divided into—

(1) Costs of the *purchase* and *consequential* thereon (see note (*e*)).

(2) Costs of *reinvestment and payment out*, see note (*f*).

(3) Costs of *orders* and "*proceedings relating thereto*," including costs arising from the land taken being *subject to suits*, or to *incumbrances*, or belonging to *persons under disability*, see note (*g*).

As to the costs under special Acts, see note (*a*), *infra*, and as to the costs where the company institutes a *suit* for specific performance, see *Regent's Canal Company* v. *Warde*, 3 Jur. N. S. 924. Where company proceeds independently of Act.

(*a*) For the meaning of "*the* special Act," see sect. 2, *supra*, p. 32. The Lands Clauses Act is held to be "incorporated" with all *subsequent* acts, authorising the taking of lands, *Ex parte Vicar of St. Sepulchre's*, 12 W. R. 499, unless such subsequent Act contains provisions inconsistent with such incorporation, *Re Cherry's Estates*, 10 W. R. 305; *Re St. Catharine's Dock Company*, 14 W. R. 978. Where a special Act was repealed by a new Act, which incorporated the Lands Clauses Act, the special Act was held to be incorporated with the Lands Clauses Act, *Re Ellison*, 8 D. M. G. 62; see *Re Holden*, 1 Jur. N. S. 995; *Re Shuttleworth*, 4 Giff. 87. "Special Act." "Incorporated therewith."

In cases where a special Act was dated before, and has *not* been *incorporated* with the Lands Clauses Act, it was the practice of the Court of Exchequer to make the company pay costs, whether they were given by the special Act or not, see *Re Robertson*, 23 Beav. 433; *Re Tiverton Market Company* (No. 2), 26 Beav. 230. Practice where the special Act gave limited costs.

But the Court of Chancery is more strict, and even where a company had paid the money into court, previously to the transfer of the equitable jurisdiction of the Court of Exchequer, holds that the company need only pay such costs as are provided for by their special Act; *Re Land's Trust*, 4 K. & J. 81, and cases there cited; *Ex parte Ecclesiastical Commissioners*, 13 W. R. 275; *Re Metford*, 8 W. R. 634; *Re Musgrave*, 6 Jur. N. S. 797; *Re Acker*, 11 W. R. 182; *Mitchell* v. *Newell*, 3 Rly. C. 315; *Ex parte Cooke*, 7 Jur. 639: but see *Re Toft*, 2 Jur. N. S. 131; *Re Allen*, 2 W. N. (1867,) 11; *Ex parte Bishop of London*, 8 W. R. 465, 714; *Re Bagot*, 10 W. R. 607, and the late case of *Re Ballinrove Workhouse*, 15 W. R. 978.

As to costs under cognate Acts, see Seton, 1089, and under the "Defence Acts," see Seton, 1092. Cognate Acts.

(*b*) In cases of doubt as to whether the refusal is wilful, the person in whose favour the reinvestment is made, ought to have the benefit of the doubt, *Re Jones*, 4 Jur. N. S. 581; *Ex parte Marshall*, 1 Phil. 560. A *wilful refusal* means a capricious refusal; and a reasonable objection, though ultimately overruled, is not a wilful refusal within the section, see *Ex parte Bradshaw*, 16 Sim. 174, where a landowner having refused to accept purchase-money awarded to be paid to him by a railway company, because he believed the award (which was afterwards decided to be valid by the Queen's Bench, but only after a long argument and after judgment reserved) to be invalid, was held not to have been guilty of a "wilful refusal" within the section. A similar decision was come to by V.-C. Kindersley in *Ex parte Railston*, 15 Jur. 1028. In that case, a What is a wilful refusal?

8 Vict. c. 18, s. 80.

railway company having summoned a jury, the landowner, being advised that notice had not been properly served on him, did not appear, and the damages having been assessed in his absence were paid into court, and it was held that the landowner was entitled to the costs of an application to have them paid over to him. See, too, *Re Windsor, Staines, and South Western Railway Act*, 12 Beav. 522, and *Ex parte Dashwood*, 3 Jur. N. S. 103, where a landowner, being advised by counsel that certain companies had no right to take his land, refused to sell, and was nevertheless held entitled to his costs. Where a vendor cannot make a clear title by reason of his not having paid off incumbrances of a larger amount than the land taken, he is clearly not guilty of a "wilful refusal," *Ex parte Divers*, 1 Jur. N. S. 995. Nor is the failure of the vendor to procure his incumbrancers to concur in a petition to the Court for the investment of the fund "a wilful default" (*ibid.*).

Wilful refusal.

But where a vendor insisted upon payment, not only of the purchase-money, but of his costs also, before he gave up possession, and the company consequently paid the purchase-money into the Bank under the 76th section of the Act, V.-C. Wood, on a petition to obtain payment out of the money, held that the vendor had been guilty of "wilful refusal," and had thus disentitled himself to receive costs, *Re Turner's Estate;* 10 W. R. 128. The vendor was also ordered to pay the costs of calling in the sheriff to give possession, *Ibid.* In another case where the money was, by reason of the vendor's "wilful refusal" to convey, paid into court under the 76th section, a petition paid by the vendor praying costs against the company was dismissed *with costs*, *Ex parte Hyde*, V.-C. K. B., March 27, 1851, cited Seton, 1087.

What costs are not reasonable.

(*c*) The Court will take care that the company are not put to unnecessary costs; *e. g.* of unnecessary matter in a petition, *Ex parte Osbaldiston*, 8 Hare, 31; *Haire* v. *Levitt*, 12 L. T. 307; but the introduction into the petition of clauses in *special Acts* is not necessarily impertinent, *Re Lilley*, 17 Sim. 110.

Lengthy petitions.

Unnecessary petitions.

So, if a second petition is necessary by reason of a defect in the first, the company will not have to pay the costs, see *Re London and Brighton Railway Company*, 18 Beav. 608, 612; *Ex parte Jolliffe*, 3 Jur. N. S. 633; *Re Byrom*, 5 Jur. N. S. 261; *secus* where the defect was in the order, *Re Goe*, 3 W. R. 129; *Ex parte Governors of Askham School*, 23 L. T. 521; see *Carpmael* v. *Proffit*, 17 Jur. 875.

Subsequent dealings with the money after transfer.

When the purchase-money has been once paid out, or transferred to a new account (*Melling* v. *Bird*, 17 Jur. 155), the company ought not to pay the costs of any further applications rendered necessary by subsequent dealings with, or settlements of the property by, the landowner; as to which, compare *Re Pick* and *Re Benyon*, cited p. 50, or by the appointment of new trustees of the property, *Re Andenshaw School*, 1 N. R. 255, and see *Ex parte Hordern*, 2 De G. & Sm. 263; *Re Byrom*, 7 W. R. 367; *Ex parte Vicar of Kidderminster*, 7 W. R. 482; see *Ex parte Baroness of Braye*, 11 W. R. 333.

Where other money is invested besides that paid in.

Where other money is invested besides the sum paid in by the company, the Court will take care that the costs are not thereby increased, *Re Branmer*, 14 Jur. 236; *Re Loveband*, 9 W. R. 12; *Ex parte Hodge*, 16 Sim. 159; *Ex parte Tetley*, 4 Rly. Ca. 55; (but see *Ex parte Lord Palmerston*, *ibid.* 57); *Ex parte King's College*, 5 De G. & Sm. 621; *Ex parte Newton*, 4 Y. & Coll. 518. In *Ex parte Mayor of Carlisle*, 1 W. R. 103, the order was made by consent. As to additional costs caused by infancy, see note to sec. 82, and as to costs of unnecessary services, see note (*g*), pp. 50, 51.

Where several companies.

(*d*) Where land is taken from one owner by several companies, the costs of his petition for reinvestment will be borne by all equally, but the costs of the *ad valorem* stamp on the conveyance will be borne rateably according to the amount contributed by each to the purchase-money, *Ex parte Bishop of London*, 2 D. F. J. 14; *Re Maryport Railway*, 32 Beav. 397, 11 W. R. 410; *Re Byron*, 1 D. J. S. 358; *Re Merton College*, 33 Beav. 257; *Re Carlisle, &c. Railway Company*, *ibid.* 253, 1 D. J. S. 358; *London and Brighton Railway* v. *Shropshire Railway*, 23 Beav. 605. Except in cases of peculiar hardship, *Re Byron*, l. c.; *Ex parte Governors of Christ's Hospital*, 2 H. & M. 166. (The cases of *Ex parte Governors of St. Thomas' Hospital*, 7 W. R. 425, and *Ex parte Dean of Christchurch*, 9 W. R. 474, are overruled.) Where the purchase-money had been paid in by two railway companies and the crown, the railway companies had to pay the whole costs in moieties, the crown not

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being liable, but their costs were not to be increased by reason of the purchase-money exceeding the amounts paid in by them, *Attorney-General* v. *Mayor of Rochester*, 15 W. R. 765 ; but where, out of several companies, respondents to a petition, only some were liable for costs, the companies charged had each to pay their original quota only, and not the whole costs, *Ex parte Ecclesiastical Commissioners*, 13 W. R. 575.

Where several companies.

In dividing the costs, companies who have amalgamated since the land was taken are treated as separate companies, *Re Maryport Railway*, 11 W. R. 507.

The landowner ought to present one petition only for payment out, or reinvestment of the money paid in by the several companies, *Ex parte Lord Broke*, 11 W. R. 205.

Costs of (1) Purchase by company.

(*e*) Costs of *purchase* in cases within this section include costs of ascertaining the value of the land conveyed ; *e. g.* by apportionment of ground-rents, *Re London, Brighton, &c. Railway Company, Ex parte Flower*, 1 L. R. Ch. 596 (*secus* in cases where the purchase is not compulsory, see note (*m*), p. 54).

Consequential costs of purchase.

Costs incurred *in consequence* of the taking of the lands, include all the costs of obtaining payment out to parties entitled, *e. g.* costs of yearly sales of stock necessary for the purpose of distribution between tenants for life and remaindermen, *Re Long*, 1 W. R. 226 ; but see *Ex parte Edmunds*, 14 W. R. 507.

Payment out.

Costs of a disentailing deed if necessary, but see note (*h*), p. 37.

Brokerage.

Costs of brokerage paid to the Accountant-General on the investment of the purchase-money in stock, *Ex parte Braithwaite*, 1 Sm. & G. App. xv. ; *Ex parte Earl of Harborough*, 22 L. T. 115 ; and see *Ex parte Corporation of Trinity House*, 3 Hare, 95 ; *Reading* v. *Hamilton*, 6 W. R. 628 ; and Seton, 1073.

Power of attorney.

Costs of a power of attorney from parties residing abroad, *Re Godley*, 10 Ir. Eq. Rep. 222 ; *Ex parte Incumbent of Guilden Sutton*, 8 D. M. G. 380.

(2) Of reinvestment.

(*f*) The rule is that the company pays the *costs of the petition* for reinvestment in all cases which are held to be within the 69th section, *Re Lathropp's Charity*, 1 L. R. Eq. 467, where the cases of *Re Bucks Railway Company*, 14 Jur. 1065, and *Re Oxford, &c. Railway Company*, 27 Beav. 571, are remarked on. As to the costs of *appearances* of remainderman, &c., see note (*g*), next page.

(α) Costs of *petition*.

The section provides that the company shall pay the costs, not only of the petition, but *of the actual reinvestment*, in cases where the reinvestment is in land ; for if a company, acting under its compulsory powers, deprives a man of his land, it is bound, at its own cost, to place him in possession of land of equal value, *Ex parte Rector of Holywell*, 2 Dr. & Sm. 465. But the section does not provide that when the purchase-money is applied in any of the other modes authorised by the 69th section, the company shall pay any costs other than those of the petition, and, accordingly, the costs of applying the purchase-money in discharge of incumbrances have been held not payable by the company, *Ex parte Corporation of Sheffield*, 21 Beav. 162 ; *Ex parte Town Trustees of Sheffield*, 8 W. R. 602 ; *Ex parte Earl of Hardwicke*, 17 L. J. Ch. 422 ; *Re Yeates*, 12 Jur. 279 : but the contrary was held in *Ex parte Trafford*, 2 Y. & Coll. 522 ; and see *Re London & South Western Railway Act*, 2 J. & H. 390 ; and the costs of proceedings to redeem the land tax were ordered to be paid by the company in *Re London and Brighton Railway Company*, 18 Beav. 608 ; *Ex parte Beddoes*, 2 Sm. & Giff. 466.

(β) Costs of *actual reinvestment*.

What costs of application of the money are not payable by company.

Redeeming incumbrances or land tax.

What are costs of *reinvesting in land*.

The company have had to pay the following under the head of *costs of reinvesting the purchase-money in other lands.*

Costs of enrolling a purchase deed, *Re Governors of Christ's Hospital*, 12 W. R. 669.

Of referring the title to the conveyancing counsel of the Court (*ante*, p. 37), *Re Morgan Jones*, 6 W. R. 762 (as to these costs, see Ord. XL. 30).

But not the costs of the vendors, *Re Dyler*, 1 Jur. N. S. 975.

Nor the fine payable on a reinvestment in purchase of copyholds, *Ex parte Vicar of Sauston*, 6 W. R. 492.

It is doubtful whether the company is liable to pay the costs of reinvestment

8 Vict. c. 18, s. 80.

even on land, where a person who has become absolutely entitled to the money, asks for such reinvestment, *Re Pick*, 10 W. R. 365; and see note (*c*), *supra*. And where a petitioner asked for payment out of the money, that it might be applied towards a purchase which had been already authorised in a suit to which the company were not parties, the company had only to pay the costs of the payment to him personally, *Re Bagot*, 14 W. R. 471. But where a person absolutely entitled to the money died, having resettled it, the company had to pay the costs of reinvestment in land, *Re Benyon* or *De Beauvoir*, 8 W. R. 425.

Costs where reinvestment in land is asked for, the money being no longer in settlement.

As to costs of serving remaindermen and trustees with the petition for reinvestment where the land taken was settled, see note (*g*), *infra*.

As to the costs of several reinvestments in land, and of interim investments, and of abortive attempts to reinvest, see note (*i*), *infra*.

Where the property is the subject of a suit.

(*g*) Where the lands taken are the subject of a suit pending in Chancery, the object of the suit not being litigation, but merely administration, or some similar proceeding under the direction of the Court, the company will have to pay the costs of references therein necessitated by the purchase, *e.g.* for ascertaining the most beneficial course for persons under disability, *Picard* v. *Mitchell*, 12 Beav. 486; *Haynes* v. *Barton*, 1 Dr. & Sm. 483; *Henniker* v. *Chafy*, 28 Beav. 621, 625, and *Re Walker*, 7 Rly. Cases, 129; *Re Taylor*, 1 Mac. & G. 210; *Re Hore's Estate*, 5 Rly. Cases, 592; *Re Hull and Selby Railway Company*, *ibid.* 458; *Re Merchant Tailors' Company*, 10 Beav. 485; but see *Re London and South Western Railway Act*, 11 W. R. 54; reversing s. c. 2 J. & H. 390; and compare *Ex parte Palmer*, 13 Jur. 781, and cases cited as to litigation between adverse claimants, *infra*, note (*h*).

Costs of references.

References in lunacy.

Where lands belonging to a lunatic were taken, and the next of kin attended inquiries into the propriety of investment, &c., their costs were held payable by the company, *Re Briscoe*, 2 D. J. S. 249; and see *Re Taylor* and *Re Walker*, l. c.

Costs of service on and appearance of parties to the suit—

It seems that the company is not liable to pay costs of the appearance of parties to the suit, where the object of the application is merely to *transfer* a fund, paid into court under the Act, to the credit of the cause for them, the other parties to the cause need not be served, and should not appear, *Eden* v. *Thompson*, 2 H. & M. 6; and see *Melling* v. *Bird*, 2 W. R. 219; *Haire* v. *Levitt*, 31 L. T. 307. In *Sidney* v. *Wilmer*, 31 Beav. 338 (an earlier case than *Eden* v. *Thompson*), on a petition to transfer the fund to the credit of the cause, and to accumulate dividends, the company were held bound to pay the costs of serving the parties to the suit made respondents, but not the costs of their appearance.

(1) where the petition is for transfer to credit of cause;

(2) where it is for payment out, &c.

But where the petition is presented to obtain *confirmation of the contract*, or *payment out*, or *reinvestment* of the money, the company has to pay the costs of appearance of all parties to the suit, including the costs of remaindermen who have obtained leave to attend the proceeding (*Paterson* v. *Paterson*, 10 L. T. N. S. 183), because it is necessary to serve them in such cases, *Haynes* v. *Barton*, 1 Dr. & Sm. 483; and see 1 L. R. Eq. 422; *Dinning* v. *Henderson*, 2 De G. & Sm. 485, and they may appear by separate counsel, *Re Long*, 12 W. R. 460; *Re Brandon*, 2 Dr. & Sm. 162; *Bradshaw* v. *Fane*, 1 N. R. 159. These cases seem to have overruled *Hore* v. *Smith*, 14 Jur. 55.

Vexatious appearances.

But there is this exception, that if the parties who might and ought to appear together, vexatiously appear separately, and thereby increase the costs, the company will not have to pay these increased costs, *Ex parte Baroness Braye*, 11 W. R. 333. And see *Re Nicholson*, 14 W. R. 475.

Where money did not stand to credit of suit.

Where the money stood in the Bank to the credit of the suit, but not in the matter of the Act, it was held that the Court had no jurisdiction to make the company pay costs, *Brown* v. *Fenwick*, 14 W. R. 257.

Costs of appearance of remaindermen.

On a petition for reinvestment of purchase-money of settled hereditaments by a tenant for life, where there is no suit, remaindermen need not be served or appear, so the company will not have to pay their costs, *Ex parte Staples*, 1 D. M. G. 294; *Wilson* v. *Foster*, 26 Beav. 398; *Re Bowes*, 12 W. R. 929; *Re Finch*, 14 W. R. 472; overruling *Re Legge*, 8 W. R. 559; but compare *Re Romney*, 3 N. R. 287.

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But it seems that the company must pay the costs of trustees who have been served and appear, *Re Duke of Cleveland's Harte Estates*, 1 Dr. & Sm. 48; *Henniker* v. *Chafy*, 35 Beav. 124; overruling on this point *Wilson* v. *Foster* (*ante*); and see *Re Burnell's Estate*, 12 W. R. 568; *Re East*, 2 W. R. 111.

Appearances of trustees;

Mortgagees and incumbrancers of the property taken should be served, and may appear, and their costs will be allowed against the company, though the petition is for payment of the purchase-money to such mortgagees, *Ex parte Baroness of Braye*, 11 W. R. 333; *Re Brooke*, 30 Beav. 233; and see 12 W. R. 1128; *Re Webster*, 2 Sm. & Giff. App. vi.; *Re Nash*, 25 L. J. Ch. 29; *Ex parte Peyton*, 2 Jur. N. S. 1013 (*Re Hadfield*, 29 Beav. 370, 9 W. R. 263, seems to be overruled). But if the incumbrance is only on the interest of a tenant for life, such incumbrancer need not be served, and his costs are not allowed, *Ex parte Smith*, 6 Rly. Cases, 150; *Re Thomas*, 12 W. R. 546; see Seton, 1080, 1086; unless the Court (*Re Smith*, 14 W. R. 218), or the company (*Re Hungerford*, 1 K. & J. 413, 3 K. & J. 455), required his appearance; and where a mortgage affects part of an estate, but not the part taken, it is clear that the mortgagee should not be served, *Re Yeates*, 12 Jur. 279. And the costs of a mortgagee's appearance, whose mortgage was created since the purchase-money was paid into court by the company, were not payable by the company, *Re Middle Level Commissioners*, June 23, 1864, V.-C. K.

of incumbrancers;

of incumbrancers on interest of tenant for life;

The costs of appearance of the Ecclesiastical Commissioners (their consent in writing to the reinvestment being sufficient), were not allowed against the company, in *Ex parte Bishop of London*, 2 D. F. J. 14; and see *Re Incumbent of Whitfield*, 1 J. & H. 610; but the costs of appearance of the Ordinary were allowed in *Ex parte Vicar of Creech St. Michael*, 21 L. J. Ch. 677, and of the Att.-Gen. on a petition under Sir S. Romilly's Act, in *Re London and Brighton Railway Company*, 18 Beav. 608; and of freemen of a city where the land taken belonged to a corporation, *Ex parte Mayor of Lincoln*, 6 Rly. Ca. 738.

of Ecclesiastical Commissioners; Ordinary; Attorney-General.

A person entitled to an aliquot share of the purchase-money may petition for payment out of such share, without serving the other parties interested, *Re Midland Railway Company*, 11 Jur. 1095.

Other persons interested.

(*h*) The words "except such as are occasioned," &c., refer to "costs" and not to "proceedings" (per Lord Justice Turner, in *Re Cant's Estates*, 1 D. F. J. 153). The usual form of order directs the company "to pay the costs of obtaining this order, &c., and of all the proceedings relating thereto, *except such costs (if any) as are occasioned by litigation between adverse claimants*," Seton, p. 1072, and see *Ex parte Hooper*, 1 Dr. 269. The latter words ought not to be omitted, unless it is clear that there are no such costs; see *Re Cant's Estate*, l. c., where the Lords Justices directed the words to be inserted "without prejudice to the course which the taxing-master might take when the matter came before him." In a simple case the order should specify what costs fall within the exception, *Re Tookey*, 16 Jur. 608; *Re Longworth*, 1 K. & J. 1; *Ex parte Collins*, 15 L. T. 362; *Ex parte Palmer*, 13 Jur. 781.

Exception of costs of litigation.

This exception only applies where there is an actual *litis contestatio* (*Re Longworth's Estates*, 1 K. & J. 1; *Re Spooner's Estate*, *ibid.* 220; *Re Hungerford's Trusts*, *ibid.* 413; *Ex parte Hooper*, 1 Drew. 264). Thus, where the land belonged to a devisee for life with remainder to the testator's heirs, it was held that the company must pay the costs of two petitions by two co-heirs, and also the costs of investigating the title of other parties who claimed to be heirs, in answer to advertisements ordered to be issued by the Court, except such costs as were occasioned by affidavits of the petitioners in answer to such claims (*Re Spooner's Estate*, 1 K. & J. 220; and see *Haire* v. *Lovitt*, 12 L. T. 306).

"Litigation between adverse claimants," what is.

Where one of two claimants of a fund in court abandoned his claim, the Company was not liable for the costs occasioned by the adverse claim, *Re English*, 13 W. R. 932.

It was said by V.-C. Kindersley, in *Re Tookey's Trust*, 16 Jur. 708; that the exception was not intended to apply to a question of construction decided

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Costs of litigation.

by the Court on petition, but to a case where an action at law was necessary to decide the rights of the parties. See, too, *Ex parte Palmer*, 13 Jur. 781, where V.-C. Shadwell laid down that "the exception in the Act was intended to apply to such a case as where an action of ejectment has been brought by one claimant of land against another," and *Re Singleton's Estate, Ex parte Fleetwood', &c. Railway Company*, 11 W. R. 871; where it was said that the mere fact of difficulties occurring in ascertaining who were the parties entitled to the money in court, did not bring the case within the exception, *Re Woodburn's Trusts*, 13 L. T. N. S. 237; *Re Gregson*, 2 H. & M. 504. As to what rights will be determined on petition under the Act, see note (*y*), *ante*, p. 45.

Where a question arising on the construction of a will relating to the property taken was argued by the petitioner and the respondents, the company was only ordered to pay one set of costs, *Ex parte Styan*, Johns. 387; see *Haire* v. *Lovitt*, 12 L. T. 306. In another case, an additional application having been rendered necessary by litigation, no order as to costs was made thereon (*Re Jolliffe*, 3 Jur. N. S. 633; see *Re Hadfield's Estate*, No. 2, 32 Beav. 252). But in *Carpmael* v. *Proffitt*, 23 L. J. Ch. 165, it was held that the fact of a second petition being rendered necessary by the investment of the purchase-monies in other lands sold in a pending suit did not bring the case within the exceptions in the Act. See Seton, 1087.

When a company has, by virtue of two different Acts, taken two pieces of land held under the same title, with knowledge that such title is disputed, and taken a conveyance from both claimants, it must pay the costs of two petitions for investment, including the costs in each case of the appearance of the adverse respondents (*Re Butterfield*, 9 W. R. 805). In *Re Bagot's Settlement*, 10 W. R. 607, V.-C. Kindersley, upon a special Act containing clauses as to costs substantially the same as those in the Lands Clauses Consolidation Act, decided that the company must pay all the costs of a petition to obtain payment of money out of court, involving a question of disputed conversion, except the costs of the petitioner and of a respondent, both of whom had failed in their contentions. And see *Hyde* v. *Edwards*, 12 Beav. 169, where payment out was sought by suit instead of by petition.

Successive investments.

(*i*) The costs of three successive reinvestments in land were ordered to be paid by the company, in *Re St. Katherine's Dock Company*, 3 Rly. Ca. 514; and see *Jones* v. *Lewis*, 2 M. & G. 163; *Re Merchant Tailors' Company*, 10 Beav. 485; *Ex parte Trustees of St. Bartholomew's Hospital*, 4 Drew. 425; *Ex parte Eton College*, 3 Rly. Ca. 271; *Ex parte Bouverie*, 4 Rly. Ca. 229; *Re Hereford, &c. Railway Company*, 13 W. R. 134; *Ex parte Rector of Loughton*, 5 Rly. Ca. 592; (where the company had to pay the costs, though 6*l.* only was invested in the second purchase); *Re Brandon*, 2 Dr. & Sm. 166; *Ex parte Fishmongers' Company*, 11 W. R. 81; but where the greater part of a sum in court was invested on one petition, it was ordered that the petitioner should apply in chambers for the reinvestment of the balance, *Re Dunraven Estates*, 10 W. R. 56; and in another case the balance was paid out to trustees under the 71st section, *Re Kinsey*, 1 N. R. 303. See Seton, 1088, and notes to Ord. XXXV. 1.

Interim investments.

The costs of interim investments in stock have been allowed against the company, *Re Liverpool Railway Company*, 17 Beav. 392; *Reading* v. *Hamilton*, 5 L. T. N. S. 628; *Ex parte Eton College*, 15 Jur. 45; but see *Ex parte Taylor*, 1 Y. & Coll. Exch. 229; *Ex parte Hirst*, 4 Y. & Coll. 468; *Re Gould*, 24 Beav. 442; and *Re Lomax*, 34 Beav. 295, where on application for investment on a mortgage security, it was ordered that the company should pay the costs of such investment, but as there had already been one interim investment in Consols (all that the section allows in ordinary cases) the investment on mortgage security must, in regard to future costs, be treated as a permanent investment.

Abortive attempts to reinvest.

Where attempts to reinvest in land fail by reason of the Court's disapproval, the company does not pay the costs, but where the Court approves, and the purchase goes off for other reasons, the company pays the costs of the *bonâ fide* attempt, *Ex parte Rector of Holywell*, 2 Dr. & Sm. 463; see *Ex parte Copley*, 4 Jur. N. S. 297; *Ex parte Eton College*, 7 W. R. 710; *Re Macdonald*, 2 L. T. N. S. 168; *Ex parte Stevens*, 15 Jur. 243; *Re*

Hardy, 18 Jur. 370; *Re Woolley*, 1 W. R. 407, 465; *Re Vawdry*, 3 Giff. 224; *Ex parte Pumfray*, 4 Rly. Ca. 490.

8 Vict. c. 18, s. 80.

Conveyances.

And with respect to the conveyances of lands, be it enacted as follows:

Form of conveyances.

LXXXI. Conveyances of lands to be purchased under the provisions of this or the special Act, or any Act incorporated therewith, may be according to the forms in the schedules (A.) and (B.) respectively to this Act annexed (*k*), or as near thereto as the circumstances of the case will admit, or by deed in any other form which the promoters of the undertaking may think fit; and all conveyances made according to the forms in the said schedules, or as near thereto as the circumstances of the case will admit, shall be effectual to vest the lands thereby conveyed in the promoters of the undertaking, and shall operate to merge all terms of years attendant by express declaration or by construction of law on the estate or interest so thereby conveyed, and to bar and to destroy all such estates tail, and all other estates, rights, titles, remainders, reversions, limitations, trusts, and interests whatsoever of and in the lands comprised in such conveyances which shall have been purchased or compensated for by the consideration therein mentioned; but although terms of years be thereby merged they shall in equity afford the same protection as if they had been kept on foot and assigned to a trustee for the promoters of the undertaking, to attend the reversion and inheritance.

(*k*) See pp. 57, 58.

Costs of conveyances.

LXXXII. The costs of all such conveyances (*l*) shall be borne by the promoters of the undertaking, and such costs shall include all charges and expenses incurred (*m*) on the part as well of the seller as of the purchaser, of all conveyances and assurances of any such lands, and of any outstanding terms or interests therein, and of deducing, evidencing, and verifying the title to such lands, terms, or interests, and of making out and furnishing such abstracts and attested copies as the promoters of the undertaking may require, and all other reasonable expenses

8 Vict. c. 18, s. 82.

incident to the investigation, deduction, and verification of such title.

Costs of conveyance in cases of contract,

(*l*) The costs of a conveyance prepared but not used by reason of incumbrancers refusing to join, were held to be payable by the company in *Re Diver's Estate*, 1 Jur. N. S. 995.

different from costs under sect. 80.

(*m*) There is a distinction between the costs payable by the company under this section and under sect. 80, *supra*, the reason being that the former section refers to cases where the company uses its *compulsory* powers and therefore has to pay *all the costs* arising out of the transaction; but this section relates to purchases *by agreement* where the vendor can make his own terms, or, if he goes before a jury, can urge any incidental expenses before the jury as a ground for increase of compensation; therefore this section deals only with the legal expenses of making a title and conveying the property, taking those expenses in their largest sense, but not with any costs of ascertaining what that is which is to be put into the document, *Ex parte Buck*, 1 H. & M. 519, where the costs of apportioning ground-rent between houses taken and houses not taken were disallowed against the company on taxation; and see *Ex parte Incumbent of Alsager*, 2 W. R. 324; *Ex parte Feoffees of Addie's Charity*, 3 Hare, 22; *Re Woodburn*, 13 L. T. N. S. 237.

Costs of apportionment;

of Petition under Trustee Act.

So the company has not to pay, under this section, the costs occasioned by a vendor dying and leaving an infant heir or devisee, so that a suit or petition under the Trustee Act is necessary, see *post*, p. 109; *Armitage* v. *Askham*, 1 Jur. N. S. 227; see *Scott* v. *Scott*, 11 W. R. 766; *Re South Wales Railway Company*, 14 Beav. 418. *Secus*, when the company has agreed to pay all the costs "of and incidental" to the conveyance, *Lake* v. *Eastern Counties Railway Company*, 19 L. T. 323; and see *Re Rhodes*, 8 Beav. 224; Seton, 1089.

Taxation of costs of conveyances.

LXXXIII. If the promoters of the undertaking and the party entitled to any such costs shall not agree as to the amount thereof (*n*), such costs shall be taxed by one of the taxing-masters of the Court of Chancery, or by a Master in Chancery in Ireland, upon an order of the same Court, to be obtained upon petition in a summary way by either of the parties; and the promoters of the undertaking shall pay what the said Master shall certify to be due in respect of such costs to the party entitled thereto, or in default thereof, the same may be recovered in the same way as any other costs payable under an order of the said Court, or the same may be recovered by distress in the manner hereinbefore provided in other cases of costs; and the expense of taxing such costs shall be borne by the promoters of the undertaking, unless upon such taxation one-sixth part of the amount of such costs shall be disallowed, in which case the costs of such taxation shall be borne by the party whose costs shall be so taxed, and the amount thereof shall be ascertained by the said master, and deducted by him accordingly in his certificate of such taxation (*o*).

(*n*) See *Re Rhodes*, 8 Beav. 224; *Lake* v. *South Coast Railway Company*, 19 L. T. 323. 8 Vict. c. 18, s. 83.

(*o*) See *Ex parte the Great Western Railway Company*, 3 Rly. Ca. 516; and *Re Spooner's Estate*, 1 K. & J. 220.

Promoters to be allowed to enter on lands before purchase, on making deposit by way of security, and giving bond.

LXXXV. Provided also, that if the promoters of the undertaking shall be desirous of entering upon and using any such lands before an agreement shall have been come to, or an award made, or verdict given for the purchase-money, or compensation to be paid by them in respect of such lands, it shall be lawful for the promoters of the undertaking to deposit (*p*) in the Bank by way of security, as hereinafter mentioned, either the amount of purchase-money or compensation claimed by any party interested in or entitled to sell and convey such lands, and who shall not consent to such entry, or such a sum as shall, by a surveyor appointed by two justices in the manner hereinbefore provided in the case of parties who cannot be found, be determined to be the value of such lands, or of the interest therein which such party is entitled to or enabled to sell and convey, and also to give to such party a bond, under the common seal of the promoters, if they be a corporation, or, if they be not a corporation, under the hands and seals of the promoters, or any two of them, with two sufficient securities, to be approved of by two justices in case the parties differ, in a penal sum equal to the sum so to be deposited conditioned for payment to such party, or for deposit in the Bank for the benefit of the parties interested in such lands, as the case may require under the provisions herein contained of all such purchase-money or compensation, as may in manner hereinbefore provided be determined to be payable by the promoters of the undertaking in respect of the lands so entered upon, together with interest thereon, at the rate of five pounds per centum per annum, from the time of entering on such lands, until such purchase-money or compensation shall be paid to such party or deposited in the Bank for the benefit of the parties interested in such lands, under the provisions herein contained (*q*); and upon such deposit by way of security being made as aforesaid, and such bond being delivered or tendered to

8 Vict. c. 18, s. 85.

such non-consenting party as aforesaid, it shall be lawful for the promoters of the undertaking to enter upon and use such lands, without having first paid or deposited the purchase-money or compensation in other cases required to be paid or deposited by them before entering upon any lands to be taken by them under the provisions of this or the special Act.

Landowner's rights, independently of deposit.

(*p*) The payment of this deposit by the railway company does not deprive the landowner of his right to have the value of the land ascertained afterwards, and to have the ordinary lien of a vendor both for such actual value and for the compensation for severance and inconvenience; *Walker* v. *Ware, &c. Railway Company*, 35 Beav. 52, 1 L. R. Eq. 195.

Interest.

(*q*) As to the interest payable where the entry was originally wrongful, but the requirements of the statute have been afterwards satisfied, see *Willey* v. *South Eastern Railway Company*, 1 M. & G. 59.

Upon deposit being made cashier to give receipt.

LXXXVI. The money so to be deposited as last aforesaid shall be paid into the Bank, in the name and with the privity of the Accountant-General of the Court of Chancery in England, or the Court of Exchequer in Ireland, to be placed to his account there to the credit of the parties interested in or entitled to sell and convey the lands so to be entered upon and who shall not have consented to such entry, subject to the control and disposition of the said Court, and upon such deposit being made, the cashier of the Bank, shall give to the promoters of the undertaking, or to the party paying in such money by their direction, a receipt for such money, specifying therein for what purpose and to whose credit, the same shall have been paid in.

Deposit to remain as a security, and to be applied under the direction of the Court.

LXXXVII. The money so deposited as last aforesaid, shall remain in the Bank by way of security to the parties whose lands shall so have been entered upon, for the performance of the condition of the bond to be given by the promoters of the undertaking as hereinbefore mentioned, and the same may, on the application by petition of the promoters of the undertaking, be ordered to be invested (*r*) in Bank Annuities or Government securities, and accumulated; and upon the condition of such bond being fully performed it shall be lawful for the Court of Chancery in England, or the Court of Exchequer in Ireland, upon a like application (*s*), to order the money so deposited in

the Funds in which the same shall have been invested together with the accumulation thereof to be repaid (*t*) or transferred to the promoters of the undertaking (*u*), or if such conditions shall not be fully performed, it shall be lawful for the said Court to order the same to be applied in such manner as it shall think fit for the benefit of the parties, for whose security the same shall so have been deposited. 8 Vict. s. 18, s. 87.

(*r*) On application by the promoters for investment the landowner need not be served, *Ex parte Carmarthen and Cardigan Railway Company*, 2 N. R. 515. Investment of deposit.

(*s*) For form of order for repayment of deposit, see Seton, 1074.

The petition for repayment of the deposit should be served on the landowner, and he is entitled to his costs of appearing, *Ex parte Stevens*, 2 Ph. 772, Seton, 1090; but Lord Romilly, M.R., disallowed such costs in *Re Tottenham, &c. Railway Company*, 14 W. R. 669. Repayment of deposit—Petition for.

(*t*) The deposit is not subject to any lien for the costs of the vendor, but upon due performance of the condition the company are entitled to have the money paid out notwithstanding that a question may be pending with respect to such costs, *Ex parte Stevens*, 2 Ph. 772, 16 Sim. 165; *Ex parte Great Northern Railway Company*, 16 Sim. 169; 5 Railway Cases, 269, s. c. on appeal, *ibid.* 272. Or notwithstanding that the landowner is proceeding at law to set aside the award, *Re Fooks*, 2 M. & G. 357. So in *Re Birmingham, Wolverhampton, and Dudley Company*, 3 N. R. 290, where that company had paid money into court in respect of lands on which they desired to enter, but an opposition company had filed a bill to restrain such entry, and the Birmingham Company in consequence gave up their intention to purchase the lands, the opposition company asked that the deposit should not be paid out to the Birmingham Company until they had paid the costs of the suit for an injunction, and contended that as the conditions of the bond given by the company had not been fulfilled, the Court had a discretion as to allowing the money to be paid out; but V.-C. Wood held that the words of the section relating to the non-fulfilment of the bond, did not apply to cases where the only reason why the condition of the bond was not fulfilled was, that neither party desired it, and he allowed the money deposited to be paid out. Deposit *repaid* though vendor's costs are not paid; though award is disputed; though the company has to pay costs of a suit; though purchase goes off.

Where a company, after paying a deposit into court and entering on lands under these sections, afterwards concluded the purchase by contract, the Court refused to pay the deposit out unless the vendor joined in the petition, or was served with a copy of it, *Ex parte South Wales Railway Company*, 6 Rly. Ca. 151; see *Ex parte Eastern Counties Railway Company*, 5 Rly. Ca. 210. *Not repaid* where a contract is afterwards entered into.

(*u*) It was held on petition by a railway company for repayment of money deposited under these sections to the secretary of the company, that payment might be ordered on the petition being stamped with the company's seal, without the necessity of verifying the seal, *Ex parte London, Chatham, and Dover Railway Company*, 8 W. R. 636. Repayment to secretary.

As to the authority requisite on the part of the company, see Seton, 1091.

SCHEDULES referred to in the foregoing Act.

Schedule (A).

Form of Conveyance.

I of in consideration of the sum of paid to me [*or, as the case may be*, into the

8 Vict. c. 18.

Bank of England (*or* Bank of Ireland), in the name and with the privity of the Accountant-General of the Court of Chancery, *ex parte* "the promoters of the undertaking" (*naming them*) *or* to *A. B.* of and *C. D.* of two trustees appointed to receive the same], pursuant to the [*here name the special Act*), by the [*here name the company or other promoters of the undertaking*], incorporated [*or* constituted] by the said Act, do hereby convey to the said company [*or other description*], their successors and assigns, all [*describing the premises to be conveyed*], together with all ways, rights, and appurtenances thereto belonging, and all such estate, right, title, and interest in and to the same as I am or shall become seised or possessed of, or am by the said Act empowered to convey to hold the premises to the said company [*or other description*], their successors and assigns, for ever, according to the true intent and meaning of the said Act. In witness whereof I have hereunto set my hand and seal, the day of in the year of our Lord .

SCHEDULE (B).

Form of Conveyance on Chief Rent.

I of in consideration of the rent-charge to be paid to me, my heirs and assigns, as hereinafter mentioned, by "the promoters of the undertaking," [*naming them*], incorporated [*or* constituted] by virtue of the [*here name the special Act*], do hereby convey to the said company [*or other description*], their successors and assigns, all [*describing the premises to be conveyed*], together with all ways, rights and appurtenances thereunto belonging, and all my estate, right, title, and interest in and to the same and every part thereof, to hold the said premises to the said company [*or other description*], their successors and assigns, for ever, according to the true intent and meaning of the said Act, they, the said company [*or other description*], their successors and

assigns, yielding and paying unto me, my heirs and assigns, one clear yearly rent of by equal quarterly [*or* half-yearly, *as agreed upon*] portions henceforth on the [*stating the days*], clear of all taxes and deductions. In witness whereof I hereunto set my hand and seal, the day of in the year of our Lord . 8 Vict. c. 18.

PARLIAMENTARY DEPOSIT ACT.

9 VICT. CAP. 20.

An Act to amend an Act of the Second Year of Her Majesty, for providing for the Custody of certain Monies paid, in pursuance of the Standing Orders of either House of Parliament, by Subscribers to Works or Undertakings to be effected under the authority of Parliament.

[18*th June*, 1846.

WHEREAS an Act was passed in the second year of the Reign of her present Majesty Queen Victoria, intituled "An Act to provide for the Custody of certain Monies paid, in pursuance of the Standing Orders of either House of Parliament, by Subscribers to Works or Undertakings to be effected under the authority of Parliament: and whereas it is expedient that the said Act should be repealed, and should be re-enacted with such modifications, extensions, and alterations as after mentioned: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the said Act shall be and is hereby repealed: Provided always, that all Acts done under the provisions of the said Act shall be good, valid, and effectual to all intents and purposes, and that all sums of money paid under the provisions of the said Act shall be dealt with in all respects as if this Act had not been passed. 9 Vict. c. 20, s. 1. 1 & 2 Vict. c. 117. Recited Act repealed. Monies already paid in to be dealt with as directed by former Act.

II. And be it enacted, that in all cases in which any sum of money is required by any Standing Order of either Authority to deposit.

9 Vict. c. 20, s. 2.

House of Parliament, either now in force or hereafter to be in force, to be deposited by the subscribers to any work or undertaking which is to be executed under the authority of an Act of Parliament, if the director or person or directors or persons having the management of the affairs of such work or undertaking, not exceeding five in number, shall apply to one of the clerks in the office of the Clerk of the Parliaments with respect to any such money required by any Standing Order of the Lords Spiritual and Temporal in Parliament assembled, or to one of the clerks of the Private Bill Office of the House of Commons with respect to any such money required by any Standing Order of the Commons in Parliament assembled, to be deposited, it shall be lawful for the clerk so applied to, by warrant or order under his hand, to direct that such sum of money shall be paid in manner hereinafter mentioned; (that is to say,) into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Chancery in England, if the work or undertaking in respect of which the sum of money is required to be deposited is intended to be executed in that part of the United Kingdom called England, or into any of the banks in Scotland established by Act of Parliament or Royal Charter, in the name and with the privity of the Queen's Remembrancer of the Court of Exchequer in Scotland, at the option of the person or persons making such application as aforesaid, in case such work or undertaking is intended to be executed in that part of the United Kingdom called Scotland, or into the Bank of Ireland, in the name and with the privity of the Accountant-General of the Court of Chancery in Ireland, in case such work or undertaking is intended to be made or executed in that part of the United Kingdom called Ireland; and such warrant or order shall be a sufficient authority for the Accountant-General of the Court of Chancery in England, the Queen's Remembrancer of the Court of Exchequer in Scotland, and the Accountant-General of the Court of Chancery in Ireland, respectively, to permit the sum of money directed to be paid by such warrant or order to be placed to an

account opened or to be opened in his name in the Bank mentioned in such warrant or order. 9 Vict. c. 20, s. 2.

III. And be it enacted, that it shall be lawful for the person or persons named in such warrant or order, or the survivors or survivor of them, to pay the sum mentioned in such warrant or order into the Bank mentioned in such warrant or order in the name and with the privity of the officer or person in whose name such sum shall be directed to be paid by such warrant or order, to be placed to his account there *ex parte* the work or undertaking mentioned in such warrant or order, pursuant to the method prescribed by any Act or Acts for the time being in force for regulating monies paid into the said Courts, and pursuant to the general orders of the said Courts respectively, and without fee or reward; and every such sum so paid in, or the securities in or upon which the same may be invested as hereinafter mentioned, or the stocks, funds, or securities authorised to be transferred or deposited in lieu thereof as hereinafter mentioned, shall there remain until the same, with all interest and dividends, if any, accrued thereon, shall be paid out of such Bank, in pursuance of the provisions of this Act: Provided always, that in case any such director or person, directors or persons, having the management of any such proposed work or undertaking as aforesaid, shall have previously invested in the Three per centum Consolidated or the Three per centum Reduced Bank Annuities, exchequer bills or other Government securities, the sum or sums of money required by any such Standing Order of either House of Parliament as aforesaid to be deposited by the subscribers to any work or undertaking which is to be executed under the authority of an Act of Parliament, it shall be lawful for the person or persons named in such warrant or order, or the survivors or survivor of them, to deposit such exchequer bills or other Government securities in the Bank mentioned in such warrant or order in the name and with the privity of the officer or person in whose name such sum shall by such warrant or order be directed to be paid, or to transfer such Government stocks or funds into the Payment of deposit.

9 Vict. c. 20, s. 3.

name of the officer or person; and such transfer or deposit shall be directed by such clerk of the office of the Clerk of the Parliaments, or such clerk of the Private Bill Office of the House of Commons, as the case may be, in lieu of payment of so much of the sum of money required to be deposited as aforesaid as the same exchequer bills or other the Government stocks or funds will extend to satisfy at the price at which the same were originally purchased by the said person or persons, director or directors as aforesaid, such price to be proved by production of the broker's certificate of such original purchase.

Investment of deposit.

IV. And be it enacted, that if the person or persons named in such warrant or order, or the survivors or survivor of them, desire to have invested any sum so paid into the Bank of England or the Bank of Ireland, or any interest or dividend which may have accrued on any stocks or securities so transferred or deposited as aforesaid, the Court in the name of whose Accountant-General the same may have been paid may, on a petition presented to such Court in a summary way by him or them, order that such sum or such interest or dividends shall, until the same be paid out to the parties entitled to the same in pursuance of this Act, be laid out in the Three per centum Consolidated or Three per centum Reduced Bank Annuities, or any Government security or securities, at the option of the aforesaid person or persons, or the survivor or survivors of them.

Repayment of deposit.

V. And be it enacted, that on the termination of the Session of Parliament in which the petition or bill for the purpose of making or sanctioning any such work or undertaking shall have been introduced into Parliament, or if such petition or bill shall be rejected or finally withdrawn by some proceeding in either House of Parliament, or shall not be allowed to proceed, or if the person or persons by whom the said money was paid or security deposited shall have failed to present a petition, or if an Act be passed authorising the making of such work or undertaking, and if in any of the foregoing cases the person or persons named in such warrant or order, or the survivors or survivor of them, or the majority of such persons, apply by

9 Vict. c. 20, s. 5.

petition to the Court in the name of whose Accountant-General the sum of money mentioned in such warrant or order shall have been paid, or such exchequer bills, stocks, or funds shall have been deposited or transferred as aforesaid, or to the Court of Exchequer in Scotland, in case such sum of money shall have been paid in the name of the said Queen's Remembrancer, the Court in the name of whose Accountant-General or Queen's Remembrancer such sum of money shall have been paid, or such exchequer bills, stocks, or funds shall have been deposited or transferred, shall by order direct the sum of money paid in pursuance of such warrant or order, or the stocks, funds, or securities in or upon which the same may have been invested, and the interest or dividends thereof, or the exchequer bills, stocks, or funds so deposited or transferred as aforesaid, and the interest and dividends thereof, to be paid or transferred to the party or parties so applying, or to any other person or persons whom they may appoint in that behalf; but no such order shall be made in the case of any such petition or bill being rejected or not being allowed to proceed, or being withdrawn or not being presented, or of an Act being passed authorising the making of such work or undertaking, unless upon the production of the certificate of the Chairman of Committees of the House of Lords with reference to any proceeding in the House of Lords, or of the Speaker of the House of Commons (*c*) with reference to any proceeding in the House of Commons, that the said petition or bill was rejected or not allowed to proceed, or was withdrawn during its passage through one of the Houses of Parliament, or was not presented, or that such Act was passed, which certificate the said Chairman or Speaker shall grant on the application in writing of the person or persons, or the majority of the persons named in such warrant, or the survivor or survivors of them: Provided always, that the granting of any such certificate, or any mistake or error therein or in relation thereto, shall not make the Chairman or Speaker signing the same liable in respect of any monies, stocks, funds, and securities which may be paid,

Granting certificate, &c., not to make the chairman or speaker signing the same liable.

9 Vict. c. 20, s. 5.

deposited, invested, or transferred in pursuance of the provisions of this Act, or the interest or dividends thereof.

(*c*) The deputy Speaker's certificate was held sufficient in *Ex parte Stockbridge Railway Bill*, 2 L. R. Eq. 364. See further as to this Act, Seton, 1103.

TRUSTEE RELIEF ACT.

10 & 11 VICT. CAP. 96.

An Act for better securing Trust Funds, and for the Relief of Trustees (*a*). [22*nd July*, 1847.

10 & 11 Vict. c. 96.

WHEREAS it is expedient to provide means for better securing trust funds, and for relieving trustees from the responsibility of administering trust funds in cases where they are desirous of being so relieved (*b*): Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that all trustees, executors, administrators, or other persons (*c*), having in their hands any monies belonging to any trust whatsoever, or the major part of them, shall be at liberty, on filing an affidavit (*d*), shortly describing the instrument creating the trust, according to the best of their knowledge and belief to pay (*e*) the same, with the privity of the Accountant-General of the High Court of Chancery, into the Bank of England, to the account of such Accountant-General in the matter of the particular trust (*f*), (describing the same by the names of the parties, as accurately as may be, for the purpose of distinguishing it), in trust to attend the orders of the said Court, and that all trustees or other persons having any annuities or stocks (*g*) standing in their name in the books of the Governor and Company of the Bank of England, or of the East India Company, or South Sea Company, or any Government or Parliamentary securities standing in their names (*h*), or in the names of any

Trustees may pay trust monies or transfer stock and securities into the Court of Chancery.

deceased persons of whom they shall be personal representatives, upon any trusts whatsoever, or the major part of them(*h*), shall be at liberty (*i*) to transfer or deposit such stocks or securities into or in the name of the said Accountant-General, with his privity, in the matter of the particular trust (describing the same as aforesaid), in trust to attend the orders of the said Court (*k*); and in every such case the receipt of one of the cashiers of the said Bank for the money so paid, or, in the case of stocks or securities, the certificate of the proper officer, of the transfer or deposit of such stocks or securities, shall be a sufficient discharge (*l*) to such trustees or other persons for the money so paid, or the stocks or securities so transferred or deposited (*m*).

10 & 11 Vict. c. 96, s. 1.

Receipt of Bank cashier, or certificate of proper officer, to be sufficient discharge.

(*a*) For the General Orders on this Act, see Ord. XLI. 1—9. Ord. XLI.

As to costs under the Act, see note (*k*), *infra*, p. 67.

As to what questions will be decided on petition under the Act, see note (*o*), p. 71, *infra*. Proceedings under Trustee Relief Act, how far equivalent to a suit.

An order under this Act has the same force as a decree, and may be impeached by a bill of review, *Re Smyth*, 11 W. R. 850 ; Daniell, 1760.

The Court will appoint a guardian *ad litem*, to an infant respondent to a petition under the Act, see Ord. VII. 3, *post*.

The Court will not order notice of a petition under the Act to be served out of the jurisdiction, *Re Barnard*, 6 Ir. Ch. R. 133 ; decided under the Irish Act, which is similarly worded. See Ord. X. 7, *post*. Service.

Payment of money into court, under the Act, is a "suit or matter actually pending," so as to give the Court jurisdiction to make orders as to charity monies paid in, without the sanction of the Charity Commissioners, which by 16 & 17 Vict. c. 137, s. 17, is necessary for all proceedings not being applications in a *suit or matter actually pending*, *Re Lister's Hospital*, 6 D. M. G. 184, followed in *Re St. Giles' Volunteer Corps*, 25 Beav. 313, and see *Re Cheshunt College*, 18 Beav. 608 ; but where an order has been made, *which is in effect final*, the matter is no longer "pending," and the sanction of the commissioners must be obtained for further proceedings, *Re Jarvis' Charity*, 1 Dr. & Sm. 97 ; but see, as to payment of charity monies to official trustees, note (*c*), next page. Jurisdiction as to charity monies.

(*b*) Where the money which it is desired to pay into court belongs to infants, use may be still made of the 36th. Geo. 3, cap. 52, which applies whether there is any difficulty in the execution of the trust or not. The 32nd section enacts, that "where by reason of the infancy or absence beyond the seas of any person entitled to any legacy, or to the residue of any personal estate or any part thereof chargeable with duty by virtue of this Act, the person or persons having or taking the burden of any will or testamentary instrument, or the administration of such personal estate, cannot pay such legacy or some part thereof, although he, she, or they may have effects for that purpose, or cannot pay such residue or some part thereof, although he, she, or they may have the same or some part thereof in his, her, or their hands, it shall be lawful for such person or persons to pay such legacy or residue, or any parts or part thereof respectively, or any sum or sums of money on account thereof, after deducting the duty chargeable thereon, into the Bank of England, with the privity of the Accountant-General of the Court of Chancery, to be placed to the account of the person or persons for whose benefit the same shall be so paid, for payment of which money the said Accountant-General shall give his certificate as usual in such cases, on production of the certificate of the com- Legacy Duties Act.

10 & 11 Vict. c. 96, s. 1.

missioners of stamps, that the duty thereon has been duly paid, and such payment into the Bank shall be a sufficient discharge for the money so paid in, provided the duty be also paid thereon as aforesaid, and such money when paid in shall be laid out by the said Accountant-General without any formal request for that purpose, in the purchase of three pounds per centum consolidated annuities, which with the dividends thereon shall be transferred and paid to the person or persons entitled thereto, or otherwise applied for his or their benefit, on application to the Court of Chancery by petition or motion in a summary way: Provided always that, if it shall afterwards appear that such money or any part thereof has been improperly paid into the Bank as aforesaid, it shall be lawful for the said Court of Chancery, upon petition in a summary way, to dispose thereof, and of the annuities purchased therewith, and the dividends received thereon, in such manner as justice shall require."

Cases on Legacy Duties Act.

An order was made upon petition under that Act for transferring a legacy of stock into the name of the Accountant-General, to the account of infant legatees (*Re Watlington's Trusts*, 1 W. R. 194, where it was held that an application for a transfer of Consols purchased with a legacy paid into court under the Act might be made *by motion*), see note (*p*), p. 72, *Ex parte Bennett*, 15 Jur. 213. It was said by Lord Alvanley, when Master of the Rolls, that, since the above statute, he would not give the costs of a suit to have a legacy bequeathed to an infant secured, as the executor has nothing to do but to pay it into court under the Act (*Whopham* v. *Wingfield*, 4 Ves. 630; *Handley* v. *Davies*, 5 Jur. 190). The executor has a year from the testator's death allowed him for paying the money into the Bank (Williams on Executors, p. 1306).

In *Rimell* v. *Simpson*, 18 L. J. Ch. 55, executors, who, instead of paying the infant's legacy into court under the 36th Geo. 3, c. 52, kept the money in their hands, were decreed to repay the legacy with interest at 4*l.* per cent. and to pay the costs of a suit to replace it. See further as to the Act, Daniell, 1847, Seton, 722, Williams on Executors, 1305.

Who may pay money into court under Trustee Relief Act.

(*c*) The following persons have been held to be entitled to pay monies into court under this Act—Mortgagees who have sold under a power of sale and are in doubt as to who is entitled to the balance of the money, *Roberts* v. *Ball*, 3 W. R. 466; Insurance Companies where there are *bonâ fide* counter claims (see *Desborough* v. *Harris*, 5 D. M. G. 430) to the monies insured, *Re Hall's Policy*, 10 W. R. 37, *Re United Kingdom Assurance Company*, 34 Beav. 493, *Re Webb's Policy*, 2 L. R. Eq. 456; purchasers who could not otherwise get receipts, *Cox* v. *Cox*, 1 K. & J. 251; but see now 22 & 23 Vict. c. 35, s. 23.

As to some out of several trustees paying in, see note (*h*), next page.

In what cases.

As to when trustees are justified in paying money into court under the Act, see note (*k*), *infra*, on "*Costs of Trustees.*"

Charity monies.

Money belonging to a *charity* in the hands of trustees or other persons, may now be paid by them to the official Trustees of Charitable Trusts, 18 & 19 Vict. c. 124, ss. 22, 23; compare note (*a*), last page, as to the sanction of the Charity Commissioners to proceedings under the Act.

Mortgagor *not* entitled to pay in under Act.

The owner of an estate charged with a sum in favour of another, is not a trustee of that sum within the Act, otherwise the incumbrancer would have to pay costs in getting the money out, *Re Buckley*, 17 Beav. 110; Lewin, 741, note (*a*); but where the incumbrancer is an infant, or of unsound mind, such money may be paid in under the 48th sect. of the Trustee Act, 1850, p. 107, *post*.

The County Courts have now jurisdiction where the sum does not exceed 500*l.* See sect. 1 of the Act, Appendix, *post*.

Form of Affidavit.

(*d*) The affidavit should not be unnecessarily long (*Re Waring*, 21 L. J. Ch. 784; *Re Woodburn*, 26 L. J. Ch. 522). See as to its form, Ord. XLI. 1, 3.

Sworn by one of two trustees.

In one case the Court allowed money standing in the names of two trustees to be paid into court on the affidavit of one only (*Anon.*, 1 Jur. N. S. 974).

Evidence.

As to evidence in proceedings under the Act, see *post*, note (*q*), p. 72.

(*e*) No order is necessary for the payment into court (*Re Bigg*, 11 Beav. 27, see Ord. XLI. 2; but see note (*g*), *infra*).

To what account fund should be paid in.

(*f*) The fund should be lodged to the credit of a particular trust (*Re Joseph's Will*, 11 Beav. 625; *Re Everett*, 12 Beav. 485; and vid., under the Irish Act, *Re Godfrey's Trust*, 2 Ir. Ch. Rep. 105). Comp. *Re Tillstone's Trusts*,

9 Hare, App. lix., where it was held that a fund bequeathed in aliquot parts on distinct trusts ought to be carried to separate accounts. Where a fund had been paid in to the general account of a testator's will, the Court at first declined to pay the same out to the residuary legatees; but upon consideration of the will it was ordered that the fund should be carried over to an account entitled "the account residue," subject to the particular legacies (*Re Robinson's Trusts*, 1 Jur. N. S. 750). Where a fund is paid into court "upon the trusts of a will," it has been held that the general administration of the testator's estate becomes necessary, and the Court will not order it to be transferred to a particular account, except on administration of assets by the personal representative, or on the responsibility of the trustee (*Re Wright's Trusts*, 15 Beav. 367; cf. *Re Edwards*, 4 W. R. 801).

Where fund is paid in "upon the trusts of a will."

But in a later case (*Re Coulson's Trusts*, 4 Jur. N. S. 6), V.-C. Wood ordered a fund paid in to the general account of a testator's will to be carried over to the separate account of the person (an infant) named in the trustee's affidavit, as the only person entitled, without previously directing the name of the account to be changed.

Transfer to separate account.

Where money is standing to the separate account of a person on the credit of any cause or matter, such person may apply in chambers for payment of the interest and dividends, Ord. XXXV. 1.

Application for dividends in chambers.

In a case where there were conflicting claims to a trust fund, and the trustees paid it into court to the account of the two claimants without serving the third, who therefore filed a bill to ascertain her rights, the suit being decided against her was dismissed as against the trustees, with costs, *Crause* v. *Cooper*, 1 J. & H. 207, 214; and see *Re Jephson*, 1 L. T. N. S. 5. So where trustees under similar circumstances paid a fund into court to the account of one of the claimants, without giving, at the same time, notice to the Court of the adverse claims, payment of the fund to the person in whose name it stood was ordered by the Court, but without prejudice to any future question as between the trustees and the adverse claimants, *Re Jenkins*, 3 N. R. 408; but see *Ex parte Tousnay*, 3 De G. & Sm., 677, where money paid in by an executor in ignorance of debts was paid out to him by consent.

Where fund is paid into a wrong account.

(*g*) Foreign bonds seem not to be within the Act, *Re Lloyd*, 2 W. R. 371; see *Burnie* v. *Getting*, 2 Coll. 324; *Knott* v. *Cottee*, 16 Beav. 77; and as to shares in insurance and other companies, see *Hankey* v. *Morley*, 4 Jur. N. S. 434; but *any* securities can be paid in under the 12 & 13 Vict. c. 74, *post*, p. 75.

What securities may be paid in.

(*h*) The survivors of several trustees may pay into court, under the Act, *Re Parry*, 6 Hare, 306; and as to payment in by a majority of the trustees, see 12 & 13 Vict. c. 74, *post*, p. 75.

Majority of trustees.

(*i*) A trustee who prefers to act personally in the trust cannot be compelled to pay the trust fund into court, *Mountain* v. *Young*, 18 Jur. 770; *Handley* v. *Davies*, 5 Jur. N. S. 190, see note (*m*) to sect. 32 of the Trustee Act, 1850, (p. 98, *post*). But where a trustee being requested to pay money into court, refused, and thereby made a suit necessary, he had to pay the costs of it, *Handley* v. *Davies*, 28 L. J. Ch. 873. An order may now be made for payment in, where the majority of the trustees are willing, though the rest do not concur, by 12 & 13 Vict. c. 74 (*post*, p. 75).

Trustee not compelled to pay in.

(*k*) Though the Act makes no mention of costs, it has been held that, as the fund paid in by the trustee is to be paid in *in trust to attend the orders of the Court*, it therefore becomes subject to the general jurisdiction of the Court, which includes a power to order the payment of costs (*Re Woodburn's Will*, 1 De G. & J. 351; *Re Armston's Trusts*, 1 Jur. N. S. 715).

Jurisdiction as to *costs* under Act.

Thus, though an unsuccessful claimant *may* be allowed his costs out of the fund (*Re Birch's Legacy*, 2 K. & J. 369; *Re Dickson*, 1 Sim. N. S. 47), it is now settled that the Court has power to order the costs of payment out to be borne by a respondent whose unfounded claim was the cause of the payment in, *Re Armston's Trusts* (l. c.). Compare *Newton* v. *Ricketts*, 9 H. L. Cases, 373, affirming *Re Ricketts*, 1 J. & H. 70, where a *feme covert* appeared on a petition for distribution of a fund in court under this Act, and together with her husband opposed the distribution, and the Court ordered a part of the fund to which she was entitled to her separate use, to be applied to payment of the costs of such opposition; and see *Re United Kingdom Life*

Costs of unsuccessful claimant.

10 & 11 Vict. c. 96, s. 1.

Assurance Company, 34 Beav. 493, and *Re Parry*, 12 Jur. 615, which decided that a party, who, although not mentioned in the affidavit, makes a claim, in consequence of which he is served, but which he afterwards, at the hearing of the petition, withdraws, will not be allowed his costs; and compare the cases as to costs of unsuccessful claimants under a special case, note (*h*), p. 133, *post*.

Costs of trustees—

Thus, again, though a trustee paying money into court is *primâ facie* entitled to his costs of such payment in, and of his appearance, when he is served, to the petition for payment out, yet the Court will exercise a discretion as to such costs if he pays the money in vexatiously.

(*a*) When payment into court is justified;

A trustee is justified in paying the money into court in all cases where he has a *bonâ fide* doubt as to the parties entitled, *Re Headington*, 6 W. R. 7; *e. g.* where the person entitled claims by representation, for there is a possibility of a disposition by the deceased person, *Re Lane*, 24 L. T. 181; *King* v. *King*, 1 De G. & J. 663; or where a married woman might claim her equity to a settlement, *Re Swan*, 2 H. & M. 34; *Re Brocklesby*, 29 Beav. 652; and see *Re Bendyshe*, 5 W. R. 816; *Re Wyllie*, 28 Beav. 458; *Re Williams*, 4 K. & J. 87.

(*β*) when payment into court is not justified.

But the older cases, which proceeded on the ground that a trustee may always pay trust money into court, under the Act, and have all his costs (see *Re Trower*, 14 Jur. 54), have been overruled, and trustees have been disallowed their costs of appearing on a petition for payment out where they acted with unreasonable caution and suspicion, *Re Leake*, 32 Beav. 135; *Re Heming*, 3 K. & J. 40; *Re Covington*, 25 L. J. Ch. 238; or have paid the money in in order to anticipate a bill about to be filed against them, *Re Waring*, 21 L. J. Ch. 784; *Att.-Gen.* v. *Alford*, 4 D. M. G. 843; or have caused unnecessary expense, *Re Metcalfe*, 3 N. R. 657; *e. g.* by requiring copies of affidavits, *Re Lazarus*, 2 K. & J. 555.

Gross misconduct of trustees paying in a clear case,

In cases of gross misconduct the trustee may even have to *pay the costs* of the petition for payment out, *Re Woodburn* (before the full Court of Appeal), 1 De G. & J. 333; *Re Carter*, 25 Beav. 361; *e. g.* where the Court considers the title of the claimant to have been perfectly clear, *Re Foligno*, 32 Beav. 131; and where the trustee neglected to make inquiries whether the parties interested were alive or dead, *Re Knight*, 27 Beav. 45; *Re Woodburn* (l. c.); but it is now settled that if before paying the money into Court the trustee deducts his costs of payment in, the Court has no jurisdiction, except on bill filed, see *Re Wright*, cited in note (*l*), *infra*, to make any order as to such costs, *Re Bloye*, 1 M. & G. 504; *Re Barber*, 9 Jur. N. S. 1098; such costs, however, have been held to be liable to taxation like the costs of a trustee's appearance, *Re Hue*, 27 Beav. 337.

or filing bill unnecessarily,

A trustee filing a bill when he might have attained his object under the Act, will have to pay the additional costs thereby incurred, *Wells* v. *Maldon*, 31 Beav. 48 (but see *Smallwood* v. *Rutter*, 9 Hare, 24); *secus*, where he has a right to claim to be discharged from the trusts, for payment in under the Act does not operate as a full discharge, *Barker* v. *Peile*, 2 Dr. & Sm. 340; see *Barker* v. *Peile*, cited in note (*l*), *infra*.

or petitioning unnecessarily.

Where a petition was presented by trustees, no cause being shown for their moving in the matter, and the *cestuis que trusts* gave no consent, they only had respondents' costs, *Re Cazneau*, 2 K. & J. 249; *Re Hutchinson*, 1 Dr. & Sm. 27; but see *Re Trower*, 1 L. T. N. S. 54.

As to costs where the trustees pay money into court to the wrong account, or without serving all parties who may be interested, see note (*f*), p. 67.

General rule as to costs—

(1) Of paying *in* and administration;

The costs of paying the money *into* court, as a general rule, ought to be paid out of the estate of the testator whose will caused the difficulty, *Re Cawthorne*, 12 Beav. 56; *Re Jones*, 3 Drew. 679. But if there be no general residue, or if the fund paid in has been completely severed and appropriated, they must come out of the fund itself, *Re Lorimer*, 12 Beav. 521.

In *Mutlow* v. *Mutlow*, 4 De G. & J. 539, a fund paid into Court under the Trustee Relief Act, was ordered to bear a proportionate share of the costs of a suit which had been instituted to administer the estate of which it formed part.

(2) of paying *out* the *corpus*;

The costs of a petition for payment of a *severed* legacy *out of court*, cannot be ordered to be paid out of testator's general estate, *Re Bartholomew*, 13 Jur. 380; (see *Re Cawthorne*, l. c.; *Re Dickson*, 1 Sim. N. S. 47; *Re Ross*, 1 Sim. N. S. 196; *Re Feltham*, 1 K. & J. 528, 534; *Re Hodyson*, 18

Jur. 786; *Re Jones*, 3 Drew, 679; *Re Robertson*, 6 W. R. 405). But leave may be given to file a bill (see p. 71), which would have the effect of throwing such costs upon the general estate (*Re Sharpe*, 15 Sim. 470, 742; see, too, *Re Feltham*, l. c.) In the latter case the costs of the executors who had paid the fund into court were ordered to come out of the general residue. 10 & 11 Vict. c. 96, s. 1.

Where a sum of stock representing sixteen shares in a legacy, five of which were held to have lapsed, was transferred into court, Lord Cranworth, V.-C., held that the lapsed shares ought to bear the costs of the petitioners and respondents, *Re Ham's Trust*, 2 Sim. N. S. 106.

See, generally, Morgan & Davey, on costs of suits for administration of assets, p. 109, *et seqq.*; and on costs under this Act, p. 211.

The Judges have settled, after consulting together, that henceforth the costs of a petition by a tenant for life for payment of the income to himself shall be payable out of income, *Re Marner*, 3 L. R. Eq. 432, where V.-C. Kindersley gives the reason why such costs are not to be paid out of corpus, namely, the expense and inconvenience of making it always necessary for the remaindermen to appear; see *Re Whitling*, 9 W. R. 830; and for the cases before the decision in *Re Marner*, *supra*, see Lewin, 746, *Re Turnley*, 1 L. R. Ch. 152. (3) of paying *out* income;

As to the amount of costs allowed on a petition for payment out, see *Gover* v. *Stilwell*, 21 Beav. 182; the costs of a second petition unnecessarily presented will be disallowed, *Re Chaplin's Trusts*, 3 N. R. 289.

As to the costs of unnecessary services, see note (*r*), p. 73, *post*. of serving respondents.

(*l*) These words do not of course mean that a trustee can, by paying trust monies into court, discharge himself from *liability* for past breaches of trust in respect of those monies, *Att.-Gen.* v. *Alford*, 2 Sm. & Giff. 488, 4 D. M. G. 843; *Re Fagg*, 19 L. J. Ch. 175; *Re Waring*, 21 L. J. Ch. 783. Nor from liability to pay in more if more is due, *Goode* v. *West*, 9 Hare, 378; *Mitchell* v. *Cobb*, 17 L. T. 25; *Re Jephson*, 1 L. T. N. S. 5; but the payment into court is so far a discharge as to the monies paid in, that the remedy of the *cestuis que trusts* in respect of any breach of trust as to such monies, or if they wish to deduct the costs retained by the trustee on payment in, is *by bill only*; see *Re Wright*, 3 K. & J. 419, 422; *Re Jenkins*, 10 Jur. N. S. 332, Lewin, 743, note (*d*). Trustee discharged *not* from liability (except as to monies paid in),

The trustee, by payment into court, discharges himself from the future administration of, and control over, the trust fund paid in, *Re Coe*, 4 K. & J. 199; *Re Wright*, 3 K. & J. 421; and the Court undertakes such administration in his place (see note (*o*) *infra*), so that when a trustee had paid money into court a new trustee was allowed to be appointed in his place, he being considered as desirous of being discharged, *Re Williams*, 4 K. & G. 87; *Re Bailey*, 3 W. R. 31. but from control and active duties.

But he is still trustee of the fund, at any rate until the Court deals with the fund, for the purpose of receiving notices as to incumbrances, &c., *Thompson* v. *Tomlins*, 2 Dr. & Sm. 8; see Ord. XLI. 1 (6); and he cannot get a full discharge except by filing a bill to have his accounts taken, *Barker* v. *Peile*, *ibid.* 341; and see note (*r*), p. 73, as to appearances of trustees. He is still liable to receive notices, &c.

(*m*) Trustees having made the payment must give notice thereof to the parties interested in the fund, Ord. XLI. 4; but where the husband of a deceased married woman, entitled to a reversionary interest in stock (which since her decease had fallen into possession, and which the trustees proposed to pay into court), was out of the jurisdiction, and had not been heard of for eight years, the Court, upon proof that proper inquiries had been made for him, directed that service upon him of notice of the payment into court might be dispensed with (*Re Hansford*, 7 W. R. 199, 254), where the following order was made:— Cestuis que trusts to have notice of the payment in.

"Upon motion . . . it was alleged . . . that it appears by an affidavit filed . . . that William Chew, named in the trustee's affidavit as the husband of Lydia Chew, also named as interested in or entitled to the said fund or sum of £ , left England about the year 1851, as cook, on board an English ship, for Hobart Town, and cannot be found, and that no information or intelligence can be obtained concerning the said William Chew. It was therefore prayed that the service upon the said William Chew of the notice of the payment into court of the said sum, required by the General Orders of this court of the 10th day of June, 1848, may be dispensed with;

10 & 11 Vict. c. 96, s. 1.

whereupon and upon reading the said affidavits of the said Samuel Sly, and the said Accountant-General's certificate, this Court doth order that the service of the notice of the said sum of £ having been paid into court upon the said William Chew, as required by the General Orders of this Court of the 10th day of June, 1848, be dispensed with."

Court of Chancery to make orders on petition, without bill, for application of trust monies and administration of trusts.

II. And be it enacted, that such orders as shall seem fit shall be from time to time made by the High Court of Chancery in respect of the trust monies, stocks, or securities so paid in, transferred, and deposited as aforesaid, and for the investment (*n*) and payment of any such monies, or of any dividends or interest on any such stocks or securities, and for the transfer and delivery out of any such stocks and securities, and for the administration of any such trusts (*o*) generally, upon a petition (*p*) to be presented in a summary way to the Lord Chancellor or the Master of the Rolls, without bill, by such party or parties (*q*) as to the Court shall appear to be competent and necessary in that behalf, and service of such petition shall be made upon such person or persons as the Court shall see fit and direct (*r*); and every order made upon any such petition shall have the same authority and effect, and shall be enforced and subject to rehearing and appeal, in the same manner as if the same had been made in a suit regularly instituted in the Court; and if it shall appear that any such trust funds cannot be safely distributed without the institution of one or more suit or suits, the Lord Chancellor or Master of the Rolls may direct any such suit or suits to be instituted (*s*).

Investment of monies paid in.

(*n*) As to investment of funds under the control of the Court, see 23 & 24 Vict. c. 38, s. 10, *post*, and note thereto.

Court's control over monies,

(*o*) The Court undertakes the control over, and administration of the fund paid in, in place of the trustee, see note (*l*), last page.

(*α*) of infants who become wards of Court;

For the cases in which an infant becomes a ward of Court by reason of proceedings under this Act, see note (*a*), p. 7.

(*β*) of lunatics and persons of unsound mind.

Where monies belonging to a person of unsound mind, but not found so by inquisition, are in court under the Act, the Court may entertain applications as to such monies in its ordinary jurisdiction, *Re Macfarlane*, 2 J. & H. 675; *Light* v. *Light*, 25 Beav. 252, overruling *Re Irby*, 27 Beav. 334; and see *Re Law*, 30 L. J. Ch. 512; *Re Berry*, 13 Beav. 455, and even where the property belonged to a lunatic, the Court has paid it out (under the authority of special enabling statutes, see Seton, 1109) to the Poor Law Guardians, *Re Upfull*, 3 M. & G. 281; *Re Parker*, 2 W. R. 139; *Re Ward*, *ibid.* 406; *Re Drewery*, *ibid.* 436; *Re Buckley*, Johnson, 700; and see *Re Sturge*, 5 Jur. N. S. 423; *Re Burke*, 6 Jur. N. S. 717; *Re Dodsworth*, 10 Hare, 16.

Jurisdiction to decide questions as in a suit.

A case of considerable importance (*Re Bloye's Trusts*, 1 M. & G. 488), as to the jurisdiction of the Court under this Act, was decided by Lord Cottenham, shortly after it came into operation. In that case the solicitors conducting the sale of

a reversionary trust fund, having purchased the property on their own account, presented a petition for payment of the fund, which had subsequently to the sale been paid into court by the trustee under the provisions of this Act. A question arose as to the propriety of the purchase by the solicitors, and the adequacy of the consideration, and a case of fraud and deception on the part of the solicitors was alleged. The Lord Chancellor, although evidently of opinion that the matter would have been better disposed of in a suit, upon the parties agreeing that it should be treated as if the respondents had presented a cross petition, praying for the payment of the fund to them, reversed the decision of the Vice-Chancellor of England, ordering payment to the actual petitioners, and made an order to bring the fund back into court, accompanied by a declaration negativing the title of the petitioners to whom it had been paid. See the case generally as to the scope and object of the Act, and particularly pp. 499, *et seq.* of 1 M. & G.. This case subsequently went to the House of Lords (*sub nom. Lewis* v. *Hillman*, 3 H. L. Ca. 607), where Lord Cottenham's decision was upheld, their Lordships being of opinion that the Court had the same jurisdiction upon a petition as upon a bill, and that, where cross petitions were presented by the adverse claimants, or where, by consent, the case was treated as if such cross petitions had been presented, the Court had full power to declare the validity or invalidity of any deed on which the claim was rested.

10 & 11 Vict. c. 96, s. 2.

Re Bloye's Trusts.

The tendency of later decisions has been to extend the applicability of the Act. Thus, it has been held that, when money is paid in under its provisions, the Court has jurisdiction to decide all questions arising concerning it, just as well as in a suit, and may, if it thinks fit, direct an issue to try the sanity of a testator, or for any other similar purpose (*Re Allen*, Kay, App. 51); and make a binding declaration of right under 15 & 16 Vict. c. 86, s. 50, *post*, p. 208 (*Re Walker*, 16 Jur. 1154; but see *Sharshaw* v. *Gibbs*, Kay, 333), and may, of course, decide as to the construction of a settlement (*Re Dallon*, 1 D. M. G. 265), or give effect to a married woman's equity to a settlement, by ordering such settlement out of the fund in court, either on her petition (*Re Disney*, 2 Jur. N. S. 206), or on that of another person (*Re Cutter*, 14 Beav. 220; *Re Kincaird*, 1 Drew. 326; *Re Grove*, 3 Giff. 575), and may even order payment to a person not petitioning (*Re Woollard*, 18 Jur. 1012, *post*, p. 72); and the mere fact that pedigrees, deaths, &c., have to be proved, which on a bill and answer might be admitted, will be no ground for directing a bill to be filed (*Re Harris*, 2 W. R. 442, following *Goode* v. *West*, 9 Hare, 378); and see *Ex parte Barnard*, 6 Ir. Ch. Rep. 133 (decided on the Irish Act, 11 & 12 Vict. c. 68), where it was doubted whether the Court had jurisdiction on a petition under the Act to decide a question of election, p. 142 (as to this point, see *Stroud* v. *Norman*, Kay, 313, 326), and where there are creditors or unascertained claims, a bill may be necessary (*Re Allen*, Kay, App. 51): but compare *Hankey* v. *Morley*, 4 Jur. N. S. 234, and *Re Trower*, 1 L. T N. S. 154, where money paid in was ordered to be distributed as in an administration suit, proper inquiries being directed. As to a general administration being made necessary by generality in the title of the affidavit, see note (*f*), *supra*. But a deed cannot be reformed on petition under the Act, *Re Malet*, 10 W. R. 332, overruling *Re Morse*, 21 Beav. 174; but see *Re Hoare*, 4 Giff. 254; nor impeached, *Re Way's Settlement*, 10 Jur. N. S. 1166 (but see *Lewis* v. *Hillman*, 3 H. L. Ca. 607); nor a breach of trust remedied (see *Re Lloyd*, 2 W. R. 271, and *ante*, note (*l*)), and if a question of adverse title has to be decided, a suit may be directed, *Re Fozard*, 24 L. J. Ch. 441; see Daniell, 1760; and the *cestuis que trusts* may file a bill to have their rights declared, *Thorp* v. *Thorp*, 1 K. & J. 438, and see *Re Sharpe*, 15 Sim. 470.

Jurisdiction under Act to decide questions

of married woman's equity to settlement,

of pedigrees, &c.,

of election,

of general administration.

But *not* to reform a deed,

nor remedy a breach of trust.

Leave given to file bill.

Where a fund is paid in under the Act, an assignee should obtain a stop order, *Re Millar*, 6 W. R. 238. Where a stop order was applied for by a creditor of a person interested in the fund in court, and the creditor served the trustees who claimed a lien for costs against the same person, the Court would not determine the question of lien, but granted the stop order without prejudice to that question, and gave the trustees their costs, see note (*r*), p. 73, against the applicant, *Re Blunt*, 10 W. R. 379; see note (*a*) to Ord. XXVI.

Stop order granted without prejudice to conflicting claims.

Though the jurisdiction of the Court is properly confined to the trust money

Prospective

10 & 11 Vict. c. 96, s. 2.

already paid in, yet a trustee who had paid a portion of trust money into Court under the Act, was ordered, on the petition of the *cestui que trust*, whose title was clear, to pay to him the *future* instalments of the fund as they were received (*Re Wright*, 1 Sm. & G. App. v.). And, in a later case, Lord Romilly, M. R., made a prospective order for payment by the Accountant-General to a tenant for life of the income of any future fund paid to the same account (*Re Chamberlain*, 22 Beav, 285, and see note to the case; and *Re Thornton*, 9 W. R. 475, cited in note to Trustee Act, 1850, s. 31, p. 98). So an order may be made for payment of dividends to successive tenants for life (*Re How*, 15 Jur. 266); and in *Re Brent*, 8 W. R. 270, an order was made under the Act for payment of the dividends of a fund in court to one tenant for life, and on proof of his death to a second tenant for life, without further order, and see Lewin, 741, note (*a*).

order for payment of future instalments and income.

Application by petition or summons.

(*p*) The application must be by *petition* (*Re Masseliu*, 15 Jur. 1073; *Ex parte Stock*, 5 Ir. Ch. Rep. 341); except where the trust fund does not exceed 300*l.*, in which case, it must be by summons in chambers, under Ord. XXXV. 1. See note to 15 & 16 Vict. c. 80, s. 26, *post*. And it seems that where the fund is over 300*l.*, a petition is necessary, even though a cause be pending in which a decree is made on further directions (*Otte* v. *Castle*, 1 W. R. 64). When, however, an order has been made on petition, further proceedings upon it may be taken by summons in chambers, *Re Hodges*, 4 D. M. G. 491. See forms of summons, *post*, App. xxx. xxxi.

Cross petitions when there are counter claims.

Where the claim is disputed, cross petitions should be presented (*Lewis* v. *Hillman*, 3 H. L. Ca. 607); but, by consent, the case may be treated as if a cross petition had been presented (*ibid.*). See last note, and Daniell, 1753. And in one case the Court, to save expense, made an order for payment of the fund to the respondents, although they had not presented a petition (*Re Woollard's Trusts*, 18 Jur. 1012).

Form of petition.

The prayer of the petition and notice thereof should specify the exact order sought for, and the precise portions of the fund which are to be transferred to the several parties entitled to it (*Ex parte Barnard*, 6 Ir. Ch. Rep. 133, under the Irish Act, 11 & 12 Vict. c. 68, the provisions of which are similar to those of this Act). As to the form of the prayer where one of several persons interested applies, see *Re Hawkes*, 18 Jur. 33, where it was said that the petition should ask that the shares of the other persons should be carried to separate accounts. The petition should set out the effect of the affidavit upon which the money is paid in (*Re Levett*, 5 De G. & Sm. 619; *Re Flack*, 10 Hare, App. xxx.), but it need not, except in special cases, set out the whole affidavit (*Re Courtois's Will*, 10 Hare, App. lxv.). For a form of petition under the Act, see Daniell, iii. 1757.

Who may petition.

(*q*) A petitioner may apply *in formâ pauperis* (*Re Money*, 13 Beav. 109; cf. *Re Lancaster*, 18 Jur. 229). As to who may apply, see Ord. XLI. 5. The trustees are not the proper persons to present the petition, though the Court will make the order on their petition (*Re Hutchinson's Trusts*, 1 Drew. & Sm. 27, where V.-C. Kindersley, following the decision in *Re Cazneau*, cited *ante*, p. 68, allowed the trustees only respondent's costs, and gave the carriage of the order to the *cestuis que trusts*); and the request of one of the *cestuis que trusts* that they should present the petition is not sufficient to justify them in doing so. See further, as to the costs of trustees, *ante*, p. 68.

Only persons named in the affidavit.

A person not mentioned in the trustee's affidavit cannot, it seems, apply (*Re Jephson*, 1 L. T. N. S. 5).

Infant and curator.

On the application of an infant domiciled in Scotland (who was above the age of puberty), and her curator properly appointed, a fund which had been brought into court under this Act was ordered to be transferred into the joint names of the infant and her curator (*Re Crichton's Trusts*, 24 L. T. 267.)

Evidence and inquiries.

The petition must be supported by proper evidence of the title of the applicant, and, if necessary, inquiries will be directed (*Re Wood*, 15 Sim. 469; *Re Sharpe*, *ibid.* 470; *Re Barber*, 1 Sm. & G. 118; *Re Morgan*, 2 W. R. 439). And a person making an affidavit may be cross-examined under 15 & 16 Vict. c. 86, s. 40, p. 193, *post* (*Re Bendyshe*, 5 W. R. 816). As to trustees taking copies of the affidavits, see *Re Lazarus*, cited p. 68, *ante*. For the practice as to payment out of court, see *ante*, note (*h*), p. 37.

(*r*) The following rule as to service is laid down by Ord. XLI. 6, 7 :—(1), that the trustees are to be served with notice of applications by persons interested in the fund ; (2), the persons interested are to be served with notice of applications by the trustees. 10 & 11 Vict. c. 96, s. 2.

Rules as to service—

(1.) Trustees, &c., paying money into court, have their costs of appearing as respondents to a petition for a stop order, *Re Blunt*, 10 W. R. 379, or (except in cases of vexatious conduct), to a petition for payment out, note (*k*), *ante*. Of trustees ;

Where a trustee avoided service, the order was made upon service at the place mentioned in his affidavit, *Ex parte Baugham*, 16 Jur. 325, but see *Re Lawrence*, 14 W. R. 93, and compare cases on substituted service in note to Ord. X. 2. Service on a trustee may be dispensed with in a clear case, *Re Young*, 5 W. R. 400 ; *Re Beauclerk*, 11 W. R. 203 ; *Re Thomas*, *ibid.*, 276.

(2.) As to dispensing with service on the ground that the party to be served is abroad and cannot be heard of, see *Re Hansford*, 7 W. R. 199, where notice of the payment in was dispensed with, quoted note (*m*), *ante*, p. 69. Parties served, who claim no interest, should not appear, and if they do, will get no costs, *Re Smith*, 3 Jur. N. S. 659 ; *Re Birch*, 2 K. & J. 369 ; *Re Justices of Coventry*, 19 Beav. 158 (but see, *contra*, *Ex parte Queen's College*, 6 W. R. 9 ; *Rudge* v. *Weedon*, 11 W. R. 819). *A fortiori* incumbrancers appearing on a petition by a prior incumbrancer, where debt exhausted the fund in court, in spite of a notice by the petitioner's solicitor that if they appeared the payment of their costs would be resisted, were held disentitled to costs, *Roberts* v. *Ball*, 24 L. J. Ch. 471, and compare cases cited *ante*, p. 51, as to appearances of incumbrancers under the Lands Clauses Act. of cestuis que trusts ;

Where a tenant for life petitions for payment of *income*, remaindermen need not be served, *Re Whitling*, 9 W. R. 830, compare cases cited *ante*, p. 50, *ad fin.* So, where the petitioner prayed that the dividends might be paid to several tenants for life, and the several shares of the corpus carried over to the accounts of numerous remaindermen, *Re Hodges*, 6 W. R. 487, and see *Ex parte Fletcher*, 12 Jur. 619 ; *Strong* v. *Strong*, 6 W. R. 455 ; and in such cases it seems that leave may be given to serve some of the parties interested on behalf of the class, *Re Colson*, 2 W. R. 46. See 15 & 16 Vict. c. 86, s. 42, p. 196, *post*. of remaindermen ;

Where a fund has been carried over to a separate account, the parties interested in the other shares need not be served (vid. *Re Hodgson*, 2 Eq. Rep. 1083 ; *Re Hawkes*, 18 Jur. 33) ; so a mortgaged share of funds paid into court under the Act, may be paid to parties clearly entitled, in the absence of the parties interested in the other shares (*Re Bedford*, 21 L. T. 164 ; and see, 15 & 16 Vict. c. 86, s. 51 ; and *Re Sharpley's Trusts*, 1 W. R. 217, where it was held that this section applied to proceedings under the Trustee Act, 1850). By analogy it would probably be held to apply to proceedings under this Act. of persons interested in other shares ;

A married woman, having a power of appointment over a reversionary trust fund, appointed it by way of mortgage, with a power of sale, under which it was afterwards sold. Her husband became bankrupt, and, after the determination of the life estate, the trustees paid the fund into court under this Act. The purchasers thereupon presented a petition for a transfer of the fund to them, which was served upon the trustees only. The Court made the order, subject to a direction that it should not be drawn up for a fortnight, and that the husband's assignees should be served with notice that the fund would be paid out if no objections were taken (*Ex parte Stuteley*, 1 De G. & Sm. 703). of persons who *may* claim adversely.

On a reasonable application, in writing, by parties residing abroad, and served with notice of a petition under the Act, the Court may postpone the order for payment out of court (*Re Hodgson's Will*, 22 L. J. Ch. 1055) ; but see as to service out of the jurisdiction, note (*a*), *supra*. Parties residing abroad.

(*s*) See *Re Fozard*, cited p. 71, *supra*, as to cases where a bill may be directed to be filed.

III. Provided always, and be it enacted, that the additional remuneration which the said Accountant-General may receive in consequence of the operation of this Act shall not have the effect of giving to him any claim for a Regulating salary of Account.-General.

10 & 11 Vict. c. 96, s. 3.

larger income by way of salary or otherwise, in the event of the said office of Accountant-General being hereafter regulated by competent authority, than would have been assigned to him if this Act had not been passed.

Lord Chancellor, with Master of the Rolls, &c., may make General Orders.

IV. And be it enacted, that the Lord Chancellor, with the assistance of the Master of the Rolls, or of one of the Vice-Chancellors, shall have power, and is hereby authorised, to make such orders as from time to time shall seem necessary for better carrying the provisions of this Act into effect (*t*).

(*t*) See Ord. XLI. 1—9.

Construction of expression "Lord Chancellor."

V. And be it enacted, that in the construction of this Act the expression "the Lord Chancellor" shall mean and include the Lord Chancellor, Lord Keeper, and Lords Commissioners for the custody of the Great Seal of Great Britain for the time being.

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12 & 13 VICT. CAP. 74.

An Act for the further Relief of Trustees.

[28*th July*, 1849.

12 & 13 Vict. c. 74.

WHEREAS difficulties have arisen in the transfer of securities vested in trustees in certain cases under the provisions of an Act passed in the session of Parliament holden in the 10th and 11th years of the reign of her present Majesty, intituled "An Act for better securing trust funds, and for the relief of trustees," and it is expedient to make a further provision for carrying into effect the objects of the said recited Act: be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that if upon any petition presented to the Lord Chancellor or Master of the Rolls in the matter of the said Act it shall appear to the judge of the Court of Chancery before whom such petition shall be heard that any monies, annuities, stocks,

or securities, are vested in any persons as trustees, executors, or administrators, or otherwise, upon trusts within the meaning of the said recited Act, and that the major part of such persons are desirous of transferring, paying, or delivering the same to the Accountant-General of the High Court of Chancery under the provisions of the said recited Act, but that for any reason the concurrence of the other or others of them cannot be had, it shall be lawful for such judge as aforesaid to order and direct such transfer, payment, or delivery to be made by the major part of such persons without the concurrence of the other or others of them; and where any such monies or Government or Parliamentary securities shall be deposited with any banker, broker, or other depositary, it shall be lawful for such judge as aforesaid to make such order for the payment or delivery of such monies, Government or Parliamentary securities, to the major part of such trustees, executors, administrators, or other persons as aforesaid, for the purpose of being paid or delivered to the said Accountant-General as to the said judge shall seem meet; and every transfer of any annuities, stocks, or securities, and every payment of money, or delivery of securities, in pursuance of any such order, shall be as valid and effectual as if the same had been made on the authority or by the act of all the persons entitled to the annuities, stocks, or securities so transferred, or the monies or securities so paid or delivered respectively, and shall fully protect and indemnify the Governor and Company of the Bank of England, the East India Company, and the South Sea Company, and all other persons acting under or in pursuance of such order (*a*).

Court of Chancery may, upon application by majority of trustees, &c., order payment or transfer of trust monies, stocks, or securities into Court of Chancery.

(*a*) An order was made under this Act in *Re Broadwood*, 8 L. T. N. S. 632.

AN ACT TO DIMINISH DELAY IN CHANCERY.

13 & 14 VICT. CAP. 35.

[See this Act, commonly called Sir G. Turner's Act, page 117, *post.*]

TRUSTEE ACT, 1850.

13 & 14 VICT. CAP. 60.

An Act to consolidate and amend the Laws relating to the Conveyance and Transfer of Real and Personal Property vested in Mortgagees and Trustees (*a*).

[*5th August*, 1850.

13 & 14 Vict. c. 60.

11 Geo. 4 & 1 Wm. 4, c. 60.

4 & 5 Wm. 4, c. 23.

1 & 2 Vict. c. 69.

WHEREAS an Act was passed in the first year of the reign of his late Majesty King William the Fourth, intituled "An Act for amending the laws respecting conveyances and transfers of estates and funds vested in trustees and mortgagees, and for enabling Courts of equity to give effect to their decrees and orders in certain cases:" and whereas an Act was passed in the fifth year of the reign of his late Majesty King William the Fourth, intituled "An Act for the amendment of the law relative to the escheat and forfeiture of real and personal property holden in trust:" and whereas an Act was passed in the second year of the reign of her present Majesty, intituled "An Act to remove doubts respecting conveyances of estates vested in heirs and devisees of mortgagees:" and whereas it is expedient that the provisions of the said Acts should be consolidated and enlarged: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that all proceedings under the said Acts or any of them commenced before the passing of this Act may be proceeded with under the said recited Acts, or according to the provisions of this Act, as shall be thought expedient, and, subject as aforesaid, that the said recited Acts shall be and the same are hereby repealed: Provided always that the several Acts repealed by the said recited Acts shall not be revived, and that such repeal shall be only on and after this Act coming into operation.

Orders under Act interfering with escheats.

(*a*) The Court will not without the Crown's consent make orders under this Act interfering with the Crown's rights to escheats, &c., see note (*m*) to sect. 19, p. 88, *post*, and *Re Giraud*, cited in note (*p*), p. 100; but see *Re Wilkinson's Trusts*, cited p. 97.

The Court will not, under this Act, decide a disputed question of title, see notes (*h*) to sect. 30 and (*m*) to sect. 32; and compare cases cited under the Trustee Relief Act, *ante*, p. 71, and note (*p*) to sect. 3, *infra*.
As to appeals from orders made under the Act, see note (*f*), p. 111.

13 & 14 Vict. c. 60, s. 1.

Interpretation of terms.

II. And whereas it is expedient to define the meaning in which certain words are hereafter used: it is declared that the several words hereinafter named are herein used and applied in the manner following respectively: (that is to say,)

The word "lands" shall extend to and include manors, messuages, tenements, and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein (*b*):

The word "stock" (*c*) shall mean any fund, annuity, or security transferable in books kept by any company or society established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any share or interest therein:

The word "seised" (*d*) shall be applicable to any vested estate for life or of a greater description, and shall extend to estates at law and in equity, in possession or in futurity, in any lands:

The word "possessed" shall be applicable to any vested estate less than a life estate, at law or in equity (*e*), in possession or in expectancy, in any lands:

The words "contingent right," as applied to lands, shall mean a contingent and executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained; also a right of entry, whether immediate or future, and whether vested or contingent:

The words "convey" and "conveyance," (*f*) applied to any person shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another lands whereof such person is seised or entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of

13 & 14 Vict. c. 60, s. 2.

3 & 4 Wm. 4, c. 74.

such conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of an Act passed in the fourth year of the reign of his late Majesty King William the Fourth, intituled "An Act for the abolition of fines and recoveries, and the substitution of more simple modes of assurance" (*f*), and including also surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of such customary or copyhold land (*g*):

The words "assign" and "assignment" shall mean the execution and performance by a person of every necessary or suitable deed or act for assigning, surrendering, or otherwise transferring lands of which such person is possessed, either for the whole estate of the person so possessed or for any less estate:

The word "transfer" shall mean the execution and performance of every deed and act by which a person entitled to stock can transfer such stock from himself to another:

The words "Lord Chancellor" shall mean as well the Lord Chancellor of Great Britain as any Lord Keeper or Lords Commissioners of the Great Seal for the time being (*h*):

The words "Lord Chancellor of Ireland" shall mean as well the Lord Chancellor of Ireland as any Keeper or Lords Commissioners of the Great Seal of Ireland for the time being:

The word "trust" shall not mean the duties incident to an estate conveyed by way of mortgage (*i*); but, with this exception, the words "trust" and "trustee" (*k*) shall extend to and include implied and constructive trusts (*l*), and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of personal representatives of a deceased person:

The word "lunatic" shall mean any person who shall

have been found to be a lunatic upon a commission of inquiry in the nature of a writ De lunatico inquirendo: — 13 & 14 Vict. c. 60, s. 2.

The expression "person of unsound mind" shall mean any person, not an infant, who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs (*m*):

The word "devisee" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the lands of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent:

The word "mortgage" shall be applicable to every estate, interest, or property in lands or personal estate, which would in a Court of equity be deemed merely a security for money (*n*):

The word "person" used and referred to in the masculine gender shall include a female as well as a male, and shall include a body corporate:

And generally, unless the contrary shall appear from the context, every word importing the singular number only shall extend to several persons or things (*o*), and every word importing the plural number shall apply to one person or thing, and every word importing the masculine gender only shall extend to a female.

(*b*) As to "lands" including "rents charge," see *Re Harrison*, cited Seton, 811. — "Lands."

"Lands" do not include leaseholds in sect. 15, where the word "seised" is used, *Re Harvey*, Seton, 819; *Re Mundel*, 8 W. R. 683; but in *Re Mundel* a vesting order was made under sect. 32 (see note (*n*), p. 98), in which sect. the word "lands" includes leaseholds, *Re Mathew*, 2 W. R. 85.

(*c*) The word "stock" includes shares in a joint-stock banking company, *Re Angelo*, 5 De G. & S. 278, and shares in ships registered under the Merchant Shipping Act, 1854. 18 & 19 Vict. c. 91, s. 10. — "Stock."

As to the powers of the Court to vest the right of transferring stock, or to vest the right to stock itself, see note (*v*) to sect. 5. — Orders vesting stock.

(*d*) See *Re Mundel*, cited in note (*b*). — "Seised."

(*e*) As to the necessity of vesting orders where a decree has been made binding equitable interests, see note (*h*) p. 96. — Equitable interests.

(*f*) See as to the effect of a vesting order under the Act generally, and especially as to its operating as a conveyance under these words to bar an entail, notes (*y*) and (*z*) to sect. 7, *infra*, p. 83. — Vesting orders. Of land entailed.

(*g*) See as to vesting orders of copyholds, sect. 28, and note, p. 95, *infra*. — Of copyholds.

(*h*) See notes to sect. 3, as to the jurisdiction over lunatics. — Lunacy jurisdiction.

13 & 14 Vict. c. 60, s. 2.

(*i*) Therefore a mortgagor cannot obtain an order for reconveyance under the Act, without suit, under sections which relate only to trustees, *e. g.* sect. 9, and see note (*h*) to sect. 30. *Secus*, where land was conveyed, not strictly by way of mortgage, but by way of trust for sale in default of payment of money borrowed, see *Re Underwood*, 3 K. & J. 745.

Mortgagee not trustee within Act.

"Sole trustee."

(*k*) As to the interpretation put on the words "sole trustee" see note to sect. 22, p. 91, *post*.

Who is trustee.

The following persons have been held to be trustees within the Act :—

Husband.

The husband of a *feme covert* trustee (under sect. 5), *Re Wood*, 3 D. F. J. 126; and of an executrix (under sect. 22), *Ex parte Bradshaw*, 2 D. M. G. 900.

Executrix.

The executrix of a surviving trustee (under sect. 4 of the Extension Act), *Re Ellis*, 24 Beav. 426.

Heir.

An heir on whom trust estates descended by reason of the disclaimer of devisees in trust (under sect. 9), *Wilks* v. *Groom*, 6 D. M. G. 205.

Heir of mortgagee.

The heir at law of a deceased mortgagee (under sects. 9 and 15), in cases not within the 19th section; *Re Skitter*, 4 W. R. 791; *Re Underwood*, 3 K. & J. 745; *Re Keeler*, 11 W. R. 62, Lewin, 760, note (*a*).

Assignee in bankruptcy.

An assignee of a bankrupt (under sect. 9), *Re Joyce*, 2 L. R. Eq. 576.

Trustee for sale.

As to the Act applying to a trustee with a mere power of sale, see note (*y*), page 83, on vesting orders.

Dower trustee.

As to a mere dower trustee being a trustee within the Act, see *Collard* v. *Roe*, 4 De G. & J. 525, whence it seems that his interest might have been bound by a decree without any order under this Act.

Constructive trustee.

(*l*) On the question whether a suit for specific performance, foreclosure, &c., is necessary before a mortgagor, or contracting party can be declared a constructive trustee, see note (*h*) to sect. 30, *post*, pp. 96, 97.

"Unsound mind."

(*m*) See note (*p*) to sect. 3, as to persons of unsound mind.

(*n*) See *Re Underwood*, cited in note (*i*), *supra*; *Lawrence* v. *Galsworthy*, 3 Jur. N. S. 1049; *Re King*, 16 Jur. 1153.

(*o*) See *Re Hartnall*, cited in note (*u*) to sect. 22.

Lord Chancellor may convey *estates* of *lunatic* trustees and mortgagees [in *lands*].

III. And be it enacted, that when any lunatic or person of unsound mind (*p*) shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor (*q*), intrusted by virtue of the Queen's Sign Manual with the care of the persons and estates of lunatics, to make an order that such lands be vested (*r*) in such person or persons in such manner and for such estate as he shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*s*).

Lunacy and unsound mind where disputed.

(*p*) The Court, under the old practice, refused to declare a trustee to be a person of unsound mind, without the usual reference to the Master (*Re Ramshay*, 15 Jur. 69); and it has been held that the section would not apply, where the alleged lunatic has not been so found by inquisition, and the fact of the lunacy is contested (*Re Campbell*, 18 L. T. 202, and *Re Walker*, C. & Ph. 147, decided under the 5th sect. of the 1 Wm. 4, c. 60; see, however, the 52nd sect. of this Act.

Where lunatic is infant.

Where an infant trustee is also of unsound mind, the case falls within the ordinary jurisdiction of the Court, *Re Arrowsmith*, 6 W. R. 742, Seton, 814.

(*q*) It was held under this section that the words "the Lord Chancellor" included the Lords Justices acting in lunacy, *Re Waugh*, 2 D. M. G. 279, and this is now expressly enacted by 15 & 16 Vict. c. 87, s. 15 *post*, p. 228, and see Trustee Extension Act, s. 10, p. 116, *post*, and *Re Arrowsmith*, 4 Jur. N. S. 1123. 13 & 14 Vict. c. 60, s. 3.

Lunatic Trustees.

Whenever the trustee or mortgagee, being under no other incapacity, is of unsound mind, even though not found a lunatic by inquisition, the application under these Acts must be made to the Lord Chancellor or Lords Justices, even though the fund is already standing to the credit of a cause (see note to sect. 43); for the jurisdiction in such cases belongs not to the Court of Chancery, but to the Lord Chancellor in Lunacy, unless the trustee is also an infant (see last note). *Re Good Intent Benefit Society*, 2 W. R. 671; *Re Davidson*, 20 L. J. Ch. 644; *Re Chauncy*,, 14 W. R. 849; and comp. *Re Irby*, 17 Beav. 385, and the cases cited by Lord Justice Turner, in *Re Ormerod*, 3 De G. & J. 249; where it was held that the V.-C. of the Duchy of Lancaster has no power under the 17 & 18 Vict. c. 82, to appoint a new trustee in the place of a trustee of unsound mind, not found so by inquisition; see, however, cases cited note (*o*) p. 70, under the Trustee Relief Act. As to the mode of applying where a fund standing in the name of a lunatic trustee is desired to be transferred to the credit of a cause, see *Re Dawson*, 6 N. R. 346, where *Jeffryes* v. *Drysdale*, 9 W. R. 428, is remarked upon.

Application to be made in lunacy.

Transfer from lunatic trustee to credit of a cause.

The order ought to be made in Chancery as well as lunacy in all cases where it is desired to appoint a new trustee, as the power in lunacy is restricted to making a vesting order, *Re Boyce*, 12 W. R. 359, and in *Re Stewart*, 8 W. R. 297, the Lords Justices, under one petition presented in Chancery and Lunacy, appointed new trustees in the place of one trustee of unsound mind, not found so by inquisition, one resident abroad, and one who was dead.

To a new trustee.

The committee ought to be served, *Re Saumarez*, 4 W. R. 658; *Re Wood*, 7 Jur. N. S. 323; and see *Re Parker's Trusts*, 11 W. R. 655; 32 Beav. 580.

Service on committee.

See, as to the costs of a petition for reconveyance when rendered necessary by the lunacy of a mortgagee, note to sect. 51, p. 109.

Costs.

(*r*) See the cases on vesting orders under the Act in notes (*y*) and (*z*) to sect. 7, *infra*, p. 83.

IV. And be it enacted, that when any lunatic or person of unsound mind shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Lord Chancellor shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right (*s*).

May convey *contingent rights* [of *lunatic* trustees and mortgagees in *lands*.]

(*s*) See notes to preceding section as to the jurisdiction in lunacy, and notes (*y*) and (*z*) to sect. 7, as to vesting orders.

V. And be it enacted, that when any lunatic (*t*) or person of unsound mind shall be solely entitled to any stock or to any chose in action upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted as aforesaid (*u*) to make an order vesting in

Lord Chancellor may transfer *stock* of *lunatic* trustees and mortgagees.

13 & 14 Vict. c. 60, s. 5.

any person or persons the right to transfer such stock, or to receive the dividends or income thereof (*v*) or to sue for and recover such chose in action, or any interest in respect thereof; and when any person or persons shall be entitled jointly with any lunatic or person of unsound mind to any stock or chose in action upon any trust or by way of mortgage, it shall be lawful for the said Lord Chancellor to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any other person or persons the said Lord Chancellor may appoint.

Who is trustee.

(*t*) Or husband of a female lunatic trustee, see note (*k*) to sect. 2.

Lunacy jurisdiction.

(*u*) As to lunatic trustees, see note (*q*) to sect. 3.

Effect of order vesting the right to transfer stock.

(*v*) These words only authorised the Court to vest in persons the right to transfer stock to themselves, and not to other persons; but this defect was supplied by sect. 6 of the Extension Act, p. 114, *post*.

The vesting order binds the Bank (sect. 26, and see note (*p*), page 90;) but the Bank appealed successfully against an order vesting the right to transfer a *fractional part* of a dividend of stock, and the new trustees in that case were consequently enabled to receive the arrears of the dividends on the whole sum, and directed to retain only such part as was subject to the trust, *Re Stewart*, 8 W. R. 425. Nor will the Court generally vest the right to receive or transfer *future* dividends of stock in a person in whose name the stock is not standing, see *Re Hartnall*, 1 De G. & Sm. 111, and even where an order was made (under sect. 22) vesting the right to receive "dividends now due or hereafter to accrue due," in three out of four trustees, one being out of the jurisdiction, this order was, on the appeal of the Bank, varied by limiting the right of the three trustees to receive the dividends to their joint lives, *Re Peyton*, 25 Beav. 317; 2 De G. & J. 290.

Form of order to transfer stock.

Directions as to transfer.

The Court may make directions as to how the right to transfer is to be exercised, *e.g.*, may direct it to be paid into court under the Trustee Relief Act; see *post*, sect. 31, and note.

As to vesting stock, &c., in the cestuis que trusts themselves, see note (*t*), p. 91, *post*.

Power to transfer *stock* of deceased person [in name of *lunatic* personal representative.]

VI. And be it enacted, that when any stock shall be standing in the name of any deceased person whose personal representative is a lunatic or person of unsound mind, or when any chose in action shall be vested in any lunatic or person of unsound mind as the personal representative of a deceased person, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and

recover such chose in action, or any interest in respect thereof, in any person or persons he may appoint (*w*). 13 & 14 Vict. c. 60, s. 6.

(*w*) See the notes to last section.

VII. And be it enacted, that where any infant shall be seised or possessed of any lands upon any trust or by way of mortgage (*x*), it shall be lawful for the Court of Chancery to make an order vesting (*y*) such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the infant trustee or mortgagee had been twenty-one years of age, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*z*). Court of Chancery may convey *estates* of *infant* trustees and mortgagees [in *land*].

(*x*) As to what words in a will are sufficient to carry estates held on trust or mortgage, and to prevent their descending on infant &c. heirs, see Lewin, 187, *Re Arrowsmith*, 6 W. R. 612; *Re Finney*, 3 Giff. 465. As to trustees taking real estate by implication, see Lewin, 177. When trust estates descend to infant heirs.

(*y*) Vesting orders in pursuance of decrees are to be applied for in Chambers, Ord. XXXV. 1. Vesting orders of land made in chambers.

Vesting orders should contain some description of the property comprised in them, *Re Ord*, 3 W. R. 386.

The Court will make orders vesting lands to "such uses as a person shall appoint, and in default, to such person in fee," *Re Powell*, 4 K. & J. 338 (where the object was to save the expense of an acknowledgment by a *feme covert*, a mortgagee's executrix). To what uses.

The Court will vest an estate in a purchaser to uses in bar of dower (*Re Lush's Estate*, 1 De G. & Sm. 436; *Davey* v. *Miller*, 1 Sm. & G. App. xix.; overruling *Re Howard*, 5 De G. & Sm. 435); but will not, it seems, insert in an order a declaration barring dower under the new law (*Re Lush*, l. c.); see Seton, 818. In bar of dower.

An order was made to vest a legal estate outstanding in an infant mortgagee in the devisees of the mortgagor, subject to a legacy charged on the land by his will (*Re Ellerthorpe*, 18 Jur. 666; see *Re Winteringham's Trusts*, 3 W. R. 578, cited in note to sect. 34). Order vesting lands subject to legacy.

As to vesting orders creating a *joint* tenancy in new and continuing trustees, see note (*d*) to sect. 10, *infra*, p. 85. In joint tenancy.

It was held that vesting orders of land under the Act could only be made where the person from whom the *land* was to be *devested* had a legal estate, and not where he had a mere power, *Re Porter*, 3 W. R. 583; but the order was subsequently made in that case; Seton, 818; and see *Re Boyce*, 12 W. R. 359. Though trustee had no legal estate.

As to the propriety of a vesting order where the interest to be assigned is only equitable, see note (*h*), p. 96. Equitable interest.

As to vesting orders of copyholds, see note (*d*), p. 95. Copyhold.

The Court may, by sect. 20, appoint a person to convey in certain cases instead of making a vesting order. A vesting order was discharged and a conveyance directed for the purpose of expressing reservations as to mines in *Turner* v. *Speakman*, Seton, 808; see *Langhorn* v. *Langhorn*, 21 L. J. Ch. 860, but it is now settled that a vesting order may be made under the Act, even though there is no incapacity in the person seised of the legal estate to execute a conveyance, *Re Manning*, Kay, App. xxviii. (under sect. 34); *Hancox* v. *Spittle*, 3 Sm. & Giff. 478. Where Court appoints person to convey instead of making vesting order.

As to costs of applications for vesting orders, see note (*h*), p. 109.

(*z*) An order vesting the legal estate of an infant remainderman in tail, Barring entail.

13 & 14 Vict. c. 60, s. 7.

made with the consent of the tenant for life, as protector, will bar the entail (*Powell* v. *Matthews*, 1 Jur. N. S. 973; see note (*f*) to sect. 2, and for form of order, *Williams* v. *Roker*, Seton, 809; cf. *Hargreaves* v. *Wright*, 1 W. R. 408; *Singleton* v. *Hopkins*, 4 W. R. 107; *Re Bloomar*, 2 De G. & J. 88). In *Beale* v. *Symonds*, cited in 2 Davidson's Conveyancing, 214 n., an order for an infant to convey an estate tail was made under the 1 Wm. 4, c. 47, which is not repealed by this Act; but in another case an order was made under the 16th sect. (*infra*), discharging an estate from contingent rights of unborn tenants in tail, and appointing a person to convey in place of an infant tenant in tail, *Hargreaves* v. *Wright*, cited in note to sect. 16.

Order barring entail.

Contingent rights barred under sect. 16.

Contingent rights of *infant* trustees and mortgagees [in *land*].

VIII. And be it enacted, that where any infant shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the infant had been twenty-one years of age, and had duly executed a deed so releasing or disposing of the contingent right (*a*).

(*a*) See last note, and as to contingent rights of *unborn* persons, see sect. 16.

[*Stock* of *infant* trustees.]

[The case of an infant trustee of *stock* is provided for by sect. 3 of the Extension Act.]

Court of Chancery may convey the *estate* of a trustee *out of the jurisdiction* of the Court [in land].

IX. And be it enacted, that when any person solely seised or possessed of any lands upon any trust (*b*) shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner and for the same estate (*c*).

(*b*) As to who is a trustee, see note (*k*) to sect. 2.

Mortgagor out of jurisdiction declared trustee under section.

(*c*) An absconding mortgagor was declared a trustee for the mortgagee after a decree for foreclosure upon motion under this section, *Lechmere* v. *Clamp*, 31 Beav. 578; see 30 Beav. 218; but such a declaration could only be obtained on a separate application (*Smith* v. *Boucher*, 1 Sm. & G. 72; see the 30th section, and note (*h*) thereto, and *Re Underwood*, 3 K. & J. 745, cited in note (*i*), page 80, *supra*).

Trustee out of jurisdiction.

For cases where the trustee being out of the jurisdiction it has been held expedient to appoint a new trustee, see note to sect. 32, p. 99.

Court may make order in cases where

X. And be it enacted, that when any person or persons shall be seised or possessed of any lands (*d*) jointly with

13 & 14 Vict. c. 60, s. 10.

persons are *seised* of *lands* jointly with parties *out of jurisdiction* of Court, &c.

a person out of the jurisdiction of the Court of Chancery, or who cannot be found, it shall be lawful for the said Court to make an order vesting the lands in the person or persons so jointly seised or possessed, or in such last-mentioned person or persons together with any other person or persons, in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

Estate vested in continuing and new trustees as joint tenants.

(*d*) The words "upon any trust" seem to have been accidentally omitted. When one of several trustees is out of the jurisdiction, and a new trustee is appointed in his place, the Court will vest the outstanding legal estate in the continuing and new trustee as *joint tenants* (*Smith* v. *Smith*, 3 Drew. 72; *Re Fisher*, 1 W. R. 505, overruling *Re Watts's Settlement*, 9 Hare, 106; *Re Plyer's Trust*, 9 Hare, 220), even though the new trustee is not appointed by the Court, *Re Marquis of Bute's Will*, Johns. 15. This section was held to apply where a trust descended upon co-parceners of whom one was out of jurisdiction, *Re Templer*, 4 N. R. 494.

Contingent rights of trustees [*out of jurisdiction* in *lands*].

XI. And be it enacted, that when any person solely entitled to a contingent right in any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right.

Court may make order in cases where persons are jointly entitled with others *out of the jurisdiction* of the Court to a *contingent right* in *lands*.

XII. And be it enacted, that when any person jointly entitled with any other person or persons to a contingent right in any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order disposing of the contingent right of the person out of the jurisdiction, or who cannot be found, to the person or persons so jointly entitled as aforesaid, or to such last-mentioned person or persons together with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who

13 & 14 Vict. c. 60, s. 12.

cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right.

When it is *uncertain* which of several trustees was the *survivor* [*lands* may be vested].

XIII. And be it enacted, that where there shall have been two or more persons jointly seised (*e*) or possessed of any lands upon any trust (*e*), and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the Court of Chancery to make an order vesting (*e*) such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

[*Stock* of trustees *out of jurisdiction*, &c.]

(*e*) [The case of *stock* being vested in trustees out of the jurisdiction, or uncertainly known, is provided for by sect. 22, p. 90.]

Land in this and the two next sections does not include leaseholds, see note (*b*), p. 79, *ante*. As to the persons included under the word *trustee*, see note (*k*), p. 80.

When it is *uncertain* whether the last trustee be *living* or dead [*lands* may be vested].

XIV. And be it enacted, that where any one or more person or persons shall have been seised (*f*) or possessed of any lands upon any trust (*f*), and it shall not be known, as to the trustee last known to have been seised or possessed, whether he be living or dead, it shall be lawful for the Court of Chancery to make an order vesting (*f*) such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

(*f*) See notes to sect. 13.

When *trustee* dies *without an heir* [*lands* may be vested].

XV. And be it enacted, that when any person seised (*g*) of any lands upon any trust (*g*) shall have died intestate as to such lands without an heir, or shall have died and it shall not be known who is his heir or devisee, it shall be lawful for the Court of Chancery to make an order vesting (*g*) such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the lands in the same manner for the same estate.

(*g*) See notes to sect. 13.

13 & 14 Vict. c. 60, s. 16.

Contingent right of *unborn* trustee [in *lands*].

XVI. And be it enacted, that when any lands are subject to a contingent right in an unborn person or class of unborn persons who upon coming into existence would in respect thereof become seized or possessed of such lands upon any trust, it shall be lawful for the Court of Chancery to make an order which shall wholly release and discharge such lands from such contingent right in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn person or class of unborn persons would upon coming into existence be seized or possessed of in such lands (*h*).

Discharge of contingent rights in suit.

(*h*) On a bill filed by purchasers from a father and son having a joint power of appointment under a settlement, against the infant heir in tail of the son, who had died before the completion of the purchase, the Court made an order discharging the estate from the contingent rights of the unborn claimants under the settlement, and appointing a person to convey in the place of the infant (*Hargreaves* v. *Wright*, 1 W. R. 408 ; cf. *Wake* v. *Wake*, *ibid.*, 283).

Sects. 17 & 18.

[The 17th and 18th sections of this Act are repealed by the "Trustee Extension Act, 1852," s. 2, *post*, p. 112.]

Power to convey [*lands*] in place of mortgagee.

XIX. And be it enacted, that when any person to whom any lands have been conveyed by way of mortgage shall have died without having entered into the possession or into the receipt of the rents and profits thereof (*i*), and the money due (*k*) in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance of such lands (*l*), then in any of the following cases it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct ; (that is to say),

[*Out of jurisdiction.*]

When an heir or devisee of such mortgagee shall be out of the jurisdiction of the Court of Chancery, or cannot be found :

[*Refusing* to convey.]

When an heir or devisee of such mortgagee shall upon a demand by a person entitled to require a conveyance of such lands, or a duly authorised agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next

13 & 14 Vict. c. 60, s. 19.

after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or a duly authorised agent of such last-mentioned person (*x*):

[*Uncertain.*] When it shall be uncertain which of several devisees of such mortgagee was the survivor:

When it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee whether he be living or dead:

[Intestate and *without heir.*] When such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died and it shall not be known who is his heir or devisee (*m*):

And the order of the said Court of Chancery made in any one of the foregoing cases shall have the same effect as if the heir or devisee or surviving devisee (as the case may be) had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

Mortgagee in possession.

(*i*) Where the mortgagee had entered into possession, a vesting order was made under sect. 15; *Re Skitter* and *Re Keeler*, cited in note (*k*), *supra*, p. 80.

Section applies where mortgage money is unpaid,

(*k*) In *Re Meyrick's Estate*, 9 Hare, 116, it seems to have been thought by V.-C. Turner, that this section did not apply where the mortgage-money was unpaid. But the principle of this decision has been overruled by a decision of the Lords Justices in *Re Boden's Mortgage Trust*, 1 D. M. G. 57; s. c. 9 Hare, 820 (followed in *Re Quinlan*, 9 Ir. Ch. R. 306, and *Re Lea's Trusts*, 6 W. R. 482), where on the petition of the executors of a mortgagee in fee, who had not been in possession of the mortgaged premises, but had died intestate as to the legal estate, and leaving an heir who could not be found, the Court under this section—the mortgage debt remaining unpaid—made an order vesting the mortgage estate in such executors, subject to the equity of redemption (vid. *Re Skitter's Trust Mortgage*, 4 W. R. 791, decided under the 9th section). But from *Re Hewitt*, 27 L. J. Ch. 302 (decided by the full Court of Appeal), it would appear that such an order will not be made, unless it is intended to sell or to transfer the mortgage.

So as to vest legal estate in mortgagee's executors.

(*l*) See, however, the preceding note, from which it appears, that notwithstanding the use of the word "reconveyance," the executor of a mortgagee who has not taken possession may obtain an order to vest the legal estate in him. It was at least doubtful, whether the 1 Wm. 4, c. 60, s. 8, applied to mortgagees (*Re Dearden*, 3 M. & K. 508). See 1 & 2 Vict. c. 69.

Rights of Crown to escheat.

(*m*) Where an illegitimate mortgagee in fee devised her real and personal estate to a trustee upon certain trusts and died without issue, the Court, the Crown offering no opposition, vested the legal estate in a purchaser, the mortgage-money having been paid off (*Re Minchin's Estate*, 2 W. R. 179). From a case of *Bartlett* v. *Bartlett*, however (cited in Ince's Trustee Acts, 2nd ed. p. 91), it would seem that where an illegitimate testator devises estates to which

he is beneficially entitled, to a trustee who predeceases him and dies without issue, a vesting order cannot be made so as to defeat the rights of the Crown. 13 & 14 Vict. c. 60, s. 19.

XX. (*n*). And be it enacted, that in every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this Act, be enabled to make an order having the effect of a conveyance or assignment of any lands, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery (as the case may be), should it be deemed more convenient, to make an order appointing a person to convey or assign such lands, or release or dispose of such contingent right (*o*); and the conveyance or assignment, or release or disposition, of the person so appointed, shall, when in conformity with the terms of the order by which he is appointed, have the same effect, in conveying or assigning the lands, or releasing or disposing of the contingent right, as an order of the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, would in the particular case have had under the provisions of this Act; and in every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this Act, be enabled to make an order vesting in any person or persons the right to transfer any stock (*p*) transferable in the books of the Governor and Company of the Bank of England, or of any other company or society established, or to be established; it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, if it be deemed more convenient, to make an order directing the secretary, deputy secretary, or accountant-general for the time being of the Governor and Company of the Bank of England, or any officer of such other company or society, at once to transfer or join in transferring the stock to the person or persons to be named in the order; and this Act shall be a full and complete indemnity and discharge to the Governor and Company of

Power to appoint a person to convey in certain cases.

13 & 14 Vict. c. 60, s. 20.

the Bank of England, and all other companies or societies and their officers and servants, for all acts done or permitted to be done pursuant thereto.

(*n*) As to the Court making vesting orders instead of ordering a conveyance under this section, see note (*y*) to sect. 7.

Form of order under s. 20.

(*o*) For the form of the conveyance in such cases, vid. *Ex parte Foley*, 8 Sim. 395, and for form of order, Seton, 794, 799, 815; and *Hancox* v. *Spittle*, 3 Sm. & G. 478; *Shepherd* v. *Churchill*, 25 Beav. 21.

Stock.

(*p*) When stock is in question, the officer of the Bank should be directed to make the transfer, and in such cases no other person need be directed to join with him in the transfer; but see Seton, 816.

As to lands in Lancaster and Durham.

XXI. And be it enacted, that as to any lands situated within the Duchy of Lancaster or the Counties Palatine of Lancaster or Durham, it shall be lawful for the Court of the Duchy Chamber of Lancaster, the Court of Chancery in the County Palatine of Lancaster (*q*), or the Court of Chancery in the County Palatine of Durham, to make a like order in the same cases as to any lands within the jurisdiction of the same Courts respectively, as the Court of Chancery has under the provisions hereinbefore contained been enabled to make concerning any lands; and every such order of the Court of the Duchy Chamber of Lancaster, the Court of Chancery in the County Palatine of Lancaster, or the Court of Chancery in the County Palatine of Durham, shall, as to such lands, have the same effect as an order of the Court of Chancery: Provided always, that no person who is anywhere within the limits of the jurisdiction of the High Court of Chancery shall be deemed by such local Courts to be an absent trustee or mortgagee within the meaning of this Act.

17 & 18 Vict. c. 82, s. 11.

(*q*) See now 17 & 18 Vict. c. 82, s. 11, which extends all the powers of this and the Extension Act to property in the County Palatine of Lancaster. But the Act does not give the Vice-Chancellor of the Duchy Court jurisdiction in lunacy (*Re Ormerod*, cited in note (*q*) to sect. 3, p. 81).

When trustees of *stock out of the jurisdiction* [or otherwise *uncertain*].

XXII. And be it enacted, that when any person or persons (*r*) shall be jointly entitled with any person out of the jurisdiction of the Court of Chancery, or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or chose in action upon any trust, it shall be lawful for the said Court to make an order vesting the right to transfer such stock,

13 & 14 Vict. c. 60, s. 22.

or to receive the dividends or income thereof (*s*), or to sue for or recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any person or persons the said Court may appoint (*t*); and when any sole trustee (*u*) of any stock or chose in action shall be out of the jurisdiction of the said Court, or cannot be found, or it shall be uncertain whether he be living or dead, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof (*s*), or to sue for and recover such chose in action, or any interest in respect thereof, in any person or persons the said Court may appoint.

Who is trustee.

(*r*) See *Ex parte Bradshaw*, and other cases cited in note (*k*) to sec. 2. This section does not apply to trustees out of the jurisdiction incapacitated by lunacy, infancy, or otherwise, see *Cramer* v. *Cramer*, cited note (*f*), p. 113.

(*s*) See note (*v*) to section 5.

Orders vesting stock.

(*t*) It seems to have been held, that the Court will not, under this section, vest the chose in action in the *cestuis que trusts* themselves (*Re Brass's Trusts*, 4 W. R. 764; but see *Ex parte Bradshaw*, 2 D. M. G. 900. In *Re Ryan's Settlement*, 9 W. R. 137, V.-C. S., a trust fund was vested in the *cestui que trust*, who had become absolutely entitled. See Lewin, 763, note (*a*). See cases cited in note (*p*), p. 100.

Vesting in *cestuis que trusts.*

"Sole trustee" where it is uncertain who survived.

(*u*) Where the master found that it was uncertain whether A., one of two trustees, was living or dead, but that B., his co-trustee, was dead, the Court refused to treat A. as a "sole trustee" within this section, it being uncertain whether he had survived the other, *Re Randall*, 1 Drew. 401. The case of two trustees both refusing to transfer, was held not to be within the next section, *Re Spawforth*, 12 W. R. 978. See remarks on that case in Lewin, 763, note (*c*). But two representatives of a sole trustee are within the section (*Re Hartnall*, 5 De G. & Sm. 111).

[When trustee of *land refuses* to convey.]

[The case of trustees of land refusing to transfer is provided for by s. 2 of the Extension Act, p. 112.]

When trustee of *stock refuses to transfer.*

XXIII. (*v*) And be it enacted, that where any sole trustee (*w*) of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, according to the direction of the person absolutely entitled (*x*) thereto for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person absolutely entitled thereto, it shall be lawful for the Court of Chancery to make an order vesting the sole right to transfer such stock, or to receive the dividends

13 & 14 Vict. c. 60, s. 23.

or income thereof (*y*), or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said Court may appoint (*z*).

(*v*) The 4th section of the Extension Act extends the provisions of this section to the case of a trustee neglecting to obey an order of the Court, see *Mackenzie* v. *Mackenzie*, 5 De G. & Sm. 338.

"Sole trustee."

(*w*) See note (*b*) to last section.

"Person absolutely entitled."

(*x*) These words include new trustees of the stock sought to be transferred, *Re Russell's Trusts*, 1 Sim. N. S. 404. But not one of two trustees, nor a tenant for life (*Mackenzie* v. *Mackenzie*, l. c.).

Service on recusant trustee.

(*y*) The refusing trustee need not be served (*Re Baxter's Will*, 2 Sm. & G. App. v.; *Ex parte Armstrong*, 16 Sim. 296; *Re Third Burnt Tree Building Society*, 12 Jur. 595, where the trustee having been served was allowed his costs against the petitioner).

(*z*) See note (*v*) to sect. 5, p. 82, *ante*.

When one of several trustees of *stock refuses to transfer* or receive and pay over dividends.

XXIV. And be it enacted, that where any one of the trustees of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action according to the directions of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him or her by such person, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof (*a*), or to sue for and recover such chose in action, in the other trustee or trustees of the said stock or chose in action, or in any person or persons whom the said Court may appoint jointly with such other trustee or trustees.

(*a*) See note (*v*) to sect. 5, p. 82, *ante*.

When *stock* is standing in the name of a deceased person, [and the personal representative is *out of jurisdiction*, &c.]

XXV. And be it enacted, that when any stock shall be standing in the sole name of a deceased person, and his or her personal representative shall be out of the jurisdiction of the Court of Chancery, or cannot be found, or it shall be uncertain whether such personal representative be living or dead, or such personal representative shall neglect or refuse to transfer such stock, or receive the dividends or income thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for

that purpose shall have been made to him by the person entitled as aforesaid, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof (*b*), in any person or persons whom the said Court may appoint. 13 & 14 Vict. c. 60, s. 25.

(*b*) See note (*v*) to sect. 5, p. 82, *ante*.

XXVI. And be it enacted, that where any order shall have been made under any of the provisions of this Act, vesting the right to any stock in any person or persons appointed by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, such legal right shall vest accordingly, and thereupon the person or persons so appointed are hereby authorised and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names or otherwise, or relating to the receipt of the dividends thereof, to the extent and in conformity with the terms of such order: and the Bank of England, and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order as the said Bank of England, or such companies, associations, or persons, would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made; and after notice in writing of any such order of the Lord Chancellor, intrusted as aforesaid, or of the Court of Chancery, concerning any stock, shall have been given, it shall not be lawful for the Bank of England, or any company or association whatever, or any person having received such notice, to act upon the requisition of the person in whose Effect of an order vesting the legal right to transfer stock.

13 & 14 Vict. c. 60, s. 26.

place an appointment shall have been made in any matter whatever relating to the transfer of such stock, or the payment of the dividends or produce thereof (*c*).

(*c*) See note (*v*) to sect. 5, p. 82, *ante*.

Effect of an order vesting legal right in a chose in action.

XXVII. And be it enacted, that where any order shall have been made under the provisions of this Act, either by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, vesting the legal right to sue for or recover any chose in action, or any interest in respect thereof in any person or persons, such legal right shall vest accordingly, and thereupon it shall be lawful for the person or persons so appointed to carry on, commence, and prosecute, in his or their own name or names, any action, suit, or other proceeding at law or in equity for the recovery of such chose in action, in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such chose in action.

Effect of an order vesting copyhold lands, or appointing any person to convey copyhold lands.

XXVIII. And be it enacted, that whensoever, under any of the provisions of this Act, an order shall be made either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, vesting any copyhold or customary lands in any person or persons, and such order shall be made with the consent of the lord or lady of the manor (*d*) whereof such lands are holden, then the lands shall, without any surrender or admittance in respect thereof, vest accordingly; and whenever, under any of the provisions of this Act, an order shall be made either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, appointing any person or persons to convey or assign any copyhold or customary lands (*e*), it shall be lawful for such person or persons to do all acts and execute all instruments for the purpose of completing the assurance of such lands; and all such acts and instruments so done and executed shall have the same effect, and every lord and lady of a manor, and every other person, shall, subject to the customs of the manor, and the usual payments, be equally bound and compellable to make admittance to such

lands, and to do all other acts for the purpose of completing the assurance thereof, as if the persons in whose place an appointment shall have been made, being free from any disability, had duly done and executed such acts and instruments. 13 & 14 Vict. c. 60, s. 28.

(*d*) See note (*y*), p. 83, as to vesting orders generally.

This section dispenses with the necessity of surrender and admittance, where a vesting order is made with the lord's consent, but it does not require such consent, and where such consent is not given, the lords of the manor ought not to be served with the petition, for the order is without prejudice as to his rights, *Re Flitchcroft*, 1 Jur. N. S. 418; *Paterson* v. *Paterson*, 2 L. R. Eq. 31; *Re Hurst* (Seton, 799); *Ayles* v. *Cox*, 17 Beav. 584. See, however, *Re Howard*, 3 W. R. 605; *Cooper* v. *Jones*, 25 L. J. Ch. 240. It is settled that the lord need not appear in court to consent (*Ayles* v. *Cox*; *Cooper* v. *Jones* (ll. c.), where a verified certificate of his consent was treated as sufficient). Copyholds vested with or without consent of lord.

(*e*) For a form of an order appointing a person to convey under this section, vid. *Re Hey's Will*, 9 Hare, 221, and Seton, 798; and as to the application of the Act to copyholds, *Re Collingwood's Trusts*, 6 W. R. 536. Form of order.

XXIX. And be it enacted, that when a decree shall have been made by any Court of Equity, directing the sale of any lands for the payment of the debts of a deceased person (*f*), every person seised or possessed of such lands, or entitled to a contingent right therein, as heir, or under the will of such deceased debtor, shall be deemed to be so seised or possessed or entitled, as the case may be, upon a trust within the meaning of this Act; and the Court of Chancery is hereby empowered to make an order wholly discharging the contingent right, under the will of such deceased debtor, of any unborn person (*g*). When a decree is made for sale of real estate for payment of debts.

(*f*) For form of order under this section, see Seton, 799. The provisions of this section are extended to decrees for sales for payment of costs, &c. (as to which see *Weston* v. *Filer*, 5 De G. & Sm. 608); by sect. 1 of the Extension Act, where the words are "for any purpose whatsoever," see 15 & 16 Vict. c. 86, s. 55, p. 219, *post*. Trustee under decrees for sale.

(*g*) When copyholds, devised to an infant for life, with remainder to his first and other sons in tail, were decreed to be sold to pay the debts of the testator; and an order was made in the cause, and pursuant to the 1 Wm. 4, c. 47 (*ante*, p. 84), that the infant's guardian should surrender them to the purchaser, it was held the purchaser might require the contingent right of the unborn issue of the infant to be discharged by an order under this section (*Wood* v. *Beetlestone*, 1 K. & J. 213, marginal note). Contingent rights discharged.

The application under this section must be to chambers (Ord. XXXV. r. 1, art. 4). Application in chambers.

XXX. And be it enacted, that where any decree (*h*) shall be made by any Court of Equity for the specific per- Court to declare what parties are trus-

13 & 14 Vict. c. 60, s. 30.

tees of lands comprised in any suit, and as to the interests of persons unborn.

formance of a contract concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands, either in cases arising out of the doctrine of election or otherwise (*h*), it shall be lawful for the said Court to declare (*i*) that any of the parties to the said suit wherein such decree is made are trustees (*k*) of such lands or any part thereof, within the meaning of this Act, or to declare concerning the interests of unborn persons (*l*) who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased, who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who upon coming into existence would be trustees within the meaning of this Act; and thereupon it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, to make such order or orders as to the estates, rights, and interests of such persons, born or unborn, as the said Court or the said Lord Chancellor might under the provisions of this Act make concerning the estates, rights, and interests of trustees born or unborn (*m*).

Constructive trustee.

(*h*) For forms of order under this section, see Seton, 801, 803.

For a form of order declaring a defendant in a suit for specific performance a trustee within the Act, see *Ex parte Duchess of Mornington*, 4 D. M. G. 537, Seton, 616; and see *Hughes* v. *Wells*, 2 W. R. 575, Seton, 616.

The application must be in chambers, Ord. XXXV. r. 1, art. 4.

Equitable interests.

It has been held that no vesting order is necessary to bind equitable interests which are affected by a decree, *Re Williams*, 5 De G. & S. 515, unless the constructive trustee is out of the jurisdiction, see *Lechmere* v. *Clamp*, 31 Beav. 578, cited in note (*c*), p. 84.

Constructive trustee of *shares* declared *without suit.*

The Court has a *discretion* to declare a constructive trust by *order* on *petition* under the Act *without decree* in a suit, *Re Angelo*, 5 De G. & Sm. 278; and accordingly a mortgagor of shares resident out of the jurisdiction, was declared a constructive trustee for the person to whom the shares were sold by the mortgagee upon the petition of such purchaser without suit. *Ibid.*

Of realty *not* without suit.

But V.-C. Wood refused to declare the infant heir of an alleged vendor a constructive trustee for the purchaser, where the contract concerned *realty*, until the rights had been ascertained by a suit, *Re Carpenter*, Kay, 418; and see *Re Williams*, 11 Sim. 54; *Jackson v. Milfield*, 5 Hare, 538; *Re Weeding*, 4 Jur. N. S. 707; and comp. *Cust* v. *Middleton*, 9 W. R. 242, where it was held by the Lords Justices that no order could be made under these Acts to carry out leases contracted to be granted by a testator whose estate was

13 & 14 Vict. c. 60, s. 30.

being administered in a suit to which the intended lessees were not parties; see, too, *Hargreaves* v. *Wright*, 1 W. R. 408, cited in note to sect. 16, *ante*, p. 87; but where an *equitable* reversionary interest in realty had been assigned to the petitioner, an order was made under the Act, without suit, vesting in him the legal interest, which had been improperly conveyed to the vendor, *Re Wilkinson*, 12 W. R. 522. And where A. covenanted to surrender copyholds to the use of B., and in the meantime to stand seised thereof upon trust for and to surrender the same to B., he was held a constructive trustee within the Act, without suit, *Re Collingwood*, 6 W. R. 536; and see Davidson, II. 589, as to the mortgagor of leaseholds by underlease, being a constructive trustee of the reversion of a day for the mortgagee. Where a testator directed his executors to sell lands and apply the money, and before his death contracted to sell the lands, the Court made an order vesting the estate outstanding in his heir in the executors, *Re Badcock*, 2 W. R. 386; and as to the heir of a mortgagee being a constructive trustee for the executors, see *Re Matthews*, *ibid.* 85; *Re Skitter*, cited in note (*k*) to sect. 2, *ante*, p. 80. So, where a vendor died before completion of a compulsory sale to a railway company, his heir was held as constructive trustee without bill filed, *Re Russell*, 12 Jur. N. S. 224, see cases cited in note (*m*) to sect. 82 of the Land Clauses Act, *ante*, p. 54.

Vendors, mortgagors, heirs, &c., when declared constructive trustees under the Act without suit.

The Court refused, on application under the Act without suit, to declare the infant heir of a deceased partner, whose surviving partner had exercised a right of purchasing the partnership property given to him by the articles of partnership, a constructive trustee for the surviving partner, *Re Burt*, 9 Hare, 289; but where lands purchased with the money of a railway company had been conveyed to two persons as tenants in common without any express declaration of trust, it being clearly proved that the lands were only held in trust, the Court treated the infant heir of one of the tenants in common who died, as a trustee for the company within the Act, *Re Brancker*, V.-C. W. Jan. 14, 1859. For cases where a suit has been directed, see note to sect. 53, p. 110, *infra*.

Suit will be directed, unless the trust is clear.

(*i*) For form of declaratory order, see Seton, 803.

(*k*) One object of the section is said to have been to obviate the necessity of inserting, in decrees of foreclosure made against infants, a day for the infant to show cause against the decree; but see *Newbury* v. *Marten*, 15 Jur. 166, Daniell, 164; and see form of subpœna for infant to show cause, Appendix, p. viii., *post*. In *Bowra* v. *Wright*, 4 De G. & Sm. 265, which was a *partition* suit, the Court declared the infant a trustee of such of the shares as were allotted to other parties. Cf. *Hancock* v. *Hancock*, Seton, 822; *Re Bloomar*, 2 De G. & J. 88; and *Re Molyneux*, 10 W. R. 512, where, on a decree for partition being made against a lunatic tenant in tail, declaring her a trustee of certain hereditaments, the committee declining to take any steps to complete the partition, a vesting order was made under this section and the Lunacy Regulation Act, 16 & 17 Vict. c. 70.

Infant defendant.

Lunatic defendants.

(*l*) As to the power of the Court to bind unborn persons, see *Hargreaves* v. *Wright*, cited in note to sect. 16, *ante*, p. 87.

(*m*) In a recent case (*Shepherd* v. *Churchill*, 25 Beav. 21), where the shares of the parties to a partition suit were very minute and complicated, the Court declared each of the parties trustees as to the shares allotted to the other of them, and vested the whole in a single trustee, with directions to convey to each of the parties their allotted shares (see form of order, 25 Beav. 23; and comp. *Orger* v. *Sparke*, 9 W. R. 180; and *Hubbard* v. *Hubbard*, 2 H. & M. 38).

Form of order in partition suits.

XXXI. And be it enacted, that it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, to make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act shall be exercised; and thereupon the person or persons

Power to make directions how the right to transfer stock is to be exercised.

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13 & 14 Vict. c. 60, s. 31.

in whom such right shall be vested shall be compellable to obey such directions and declarations by the same process as that by which other orders under this Act are enforced (*n*).

Stock ordered to be transferred into court.

(*n*) The Court may order the person to whom a fund is paid, to pay it into court under the Trustee Relief Act; see *Re Thornton*, 9 W. R. 475; *Re Draper*, 9 W. R. 805; but an order for payment direct into court will not be made, *Re Parby*, 29 L. T. 72; see, however, *Re Pitt*, 1 Jur. N. S. 1155, and *Re Dawson*, cited note (*q*), p. 101, *post*.

Power to Court to make order appointing new trustees.

XXXII. And be it enacted, that whenever it shall be expedient (*o*) to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable (*p*) so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees (*q*).

New trustees of *charities*.

(*o*) Appointments of new trustees of *charities* may be obtained by summons in chambers under the Charitable Trusts Act, 1853 (or in simple cases by application to the Charity Commissioners under the Act of 1860), and the property may be vested under sect. 45 of this Act, p. 106, *post*, see Lewin, 610—611, and Ord. XLI. 10—13, *post*, and note (*y*) thereto; but the jurisdiction of the Court to act *upon petition* is preserved concurrently, see Seton, 355, 362, 787.

Upon petition.

Fiat of Attorney-General.

The Court would not, under this section, appoint new trustees of charities, without the fiat of the Attorney-General, see *Re Rolles' Charity*, 3 D. M. G. 153; *Re Lancaster Charities*, 9 W. R. 192; *Att.-Gen.* v. *Cooper*, 10 W. R. 31. But this has not always been adhered to, see Lewin, 610.

Form of application.

Applications for the appointment of new trustees of a charity should be entitled in Sir S. Romilly's Act, 52 G. 3, c. 101, cited Lewin, 666 (*Re Rolles' Charity* (l. c.), *Re Bierten Charity Land*, 10 Hare, App. xxxviii.), and in the Trustee Act, and such other Act as is applicable, *e. g.* the Municipal Corporations Act, 5 & 6 Will. 4, c. 76, *Re the Gloucester Charities*, 10 Hare, App. iii.

Charity Commissioners.

No proceeding respecting charities, not being an application in a suit or matter actually pending, is to be taken without the sanction of the Charity Commissioners, 16 & 17 Vict. c. 137, s. 17; and see *Re Jarvis' Charity*, 1 Dr. & Sm. 97, cited *ante*, p. 65; *Re Conyer's Grammar School*, 10 Hare, App. v.; *Re Warwick Charities*, 1 Phill. 559.

NEW TRUSTEES.

The Court will not on petition enter into—

(1) Validity of instruments;

(2) Misconduct of trustees.

This section only provides machinery in cases where, on the face of the instrument, it appears difficult, impracticable, or inexpedient to act without the Court's aid; and does not give the Court jurisdiction to consider the validity of the instrument or the conduct of trustees on petition.

(1) The Court will not consider the question of validity, *Re Matthews*, 26 Beav. 463; *Re Harrison*, 22 L. J. 60; Sugden on Real Property Statutes, 434 note; and see *Att.-Gen.* v. *Ward*, 6 Hare, 477, where the deed declaring the trusts had not been enrolled (as it should have been), but the Court appointed new trustees, the old trustees admitting the trusts.

(2) The Court will not, on petition, appoint a new trustee on any ground not appearing on the face of the instrument; *e. g.* on the ground of the trustee's misconduct, *Re Bridgman*, 1 Dr. & Sm. 164; *Legg* v. *Mackrell*, 1 Giff. 165; or because the donee of the power is about to exercise it corruptly, *Re Hodson*, 9 Hare, 118; *Re Hadley*, 5 De G. & Sm. 67.

Nor will the Court, on petition under the section, remove a trustee without or against his consent, *Re Blanchard*, 9 W. R. 647; *Re Garty*, 10 L. T. N. S. 321; *Re Dennis*, 12 W. R. 575. In such cases a bill must be filed, see Lewin, ch. xxvi. p. 604. 13 & 14 Vict. c. 60, s. 32.

The Court has considered it expedient to exercise its statutory powers of appointing new trustees in the following cases: Cases: (A). where *expedient* to appoint new trustees.

Where a vesting order could not otherwise have been obtained, see *Re Mundel*, cited in note (*b*), p. 79.

Where there was great difficulty in obtaining administration to a deceased trustee, *Re Matthews*, 26 Beav. 463; *Davis* v. *Chanter*, 6 W. R. 415. Difficulty;

Where one of two trustees for sale was an infant (*Re Porter*, 2 Jur. N. S. 349). And the Court will generally appoint a new trustee in the place of an infant, even though appointed by the testator himself (*Re Gartside*, 1 W. R. 196). infancy;

It has been held, that the mere fact of a trustee residing out of the jurisdiction of the court is not always a ground for holding it expedient to appoint another in his place, *Re Mais*, 16 Jur. 608; *Re Moravian Society*, 26 Beav. 101; *Re Watt's Settlement*, 9 Hare, 196; *Withington* v. *Withington*, 16 Sim. 104, where a trustee who had gone to reside in China was held not to be incapable of acting; and see *Re Blanchard*, and other cases, cited in note (*m*), *supra*. But see *Mennard* v. *Welford*, 1 Sm. & G. 426, where a trustee, residing permanently abroad, was pronounced by V.-C. Stuart incapable of acting as a trustee of property in England; and *Re Guibert*, 16 Jur. 852; *Re Stewart*, 8 W. R. 297; *Re Joyce*, 2 L. R. Eq. 576. residence abroad;

In some cases, where a trustee has become bankrupt, the Court has held it expedient to appoint a new trustee, and the Court of Chancery has jurisdiction in such a case, see the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, Schedule G. (cited Lewin, 607), which provides that "If any bankrupt shall, as trustee, be seised, possessed of, or entitled to, either alone or jointly, any real or personal estate, or any interest secured upon or arising out of the same, or shall have standing in his name as trustee, either alone or jointly, any government stock, funds, or annuities, or any of the stock of any public company, either in England, Scotland, or Ireland, it shall be lawful for the *Lord Chancellor, on the petition of the person entitled in possession to the receipt of the rents*, issues, and profits, dividends, interest, or produce thereof, on due notice given to all other persons (if any) interested therein, to order the assignees and all persons whose act or consent thereto is necessary, to convey, assign, or transfer the said estate, interest, stock, funds, or annuities, to such person as the Lord Chancellor shall think fit, upon the same trusts as the said estate, interest, stock, funds, or annuities were subject to before the bankruptcy, or such of them as shall be then subsisting and capable of taking effect, and also to receive and pay over the rents, issues, and profits, dividends, interest, or produce thereof, as the Lord Chancellor shall direct." See as to the jurisdiction of the M. R. and Vice-Chancellors, *Re Heath*, 9 Hare, 616; *Breed* v. *Caffoll*, 24 L. T. 308; *Ex parte Walker*, 19 L. J. Bank. 3, Seton 779, 781, 2. In *Re Lonsdale*, 14 Jur. 1101, V.-C. Knight Bruce considered that persons entitled to an annuity, payable out of trust funds, were persons "entitled in possession," within the meaning of this section. The mere fact of bankruptcy, however, is not a sufficient ground for removal (*Re Bridgman*, 1 Drew. & Sm. 104; but see *Harris* v. *Harris*, 29 Beav. 107; *Re Roche*, 2 H. L. Ca. 460); and it should be remembered that property vested in a bankrupt as a bare trustee does not pass to his assignees (*Ex parte Gennys*, Mont. & M. 258; see Lewin, 608 (δ)). bankruptcy. Under 24 & 25 Vict. c. 134. Power of Lord Chancellor; of Master of the Rolls and Vice-Chancellors. Bankruptcy not always ground for petition.

As to appointing a new trustee in place of a person convicted of felony, see "Trustee Extension Act, 1852," *post*, s. 8. Felony.

(*p*) Cases where it is impracticable to appoint new trustees without the aid of the Court arise, where there is a power given by an instrument for appointment of new trustees, but either (1) the donee of the power is incapacitated by lunacy or other causes, or (2) the words of the power do not apply to the case which has arisen. (B). Where *impracticable* to appoint without Court's aid:

(1) Where the incapacity of the donee arises from lunacy, the application should be made under the Lunacy Regulation Act, 16 & 17 Vict. c. 70; see *Re* (1) Where *donee of power* lunatic.

13 & 14 Vict. c. 60, s. 32.

16 & 17 Vict. c. 70.

Parker, 32 Beav. 580 (cited Lewin, 768); and *Re Bowmar*, 3 De G. & J. 658, where sects. 136, 137 of the Lunacy Regulation Act are set out, which provide that where a power is vested in a lunatic in the character of a trustee, the committee on behalf of the lunatic, under an order made upon the application of any person interested in the exercise of the power, may exercise it; and new trustees appointed under such power shall have the same rights and powers as if the order had been made under the Trustee Acts.

(2) Where power in instrument insufficient.

(2) For cases where the power given by the instrument did not meet the case which happened, see *Re Woodgate*, 5 W. R. 448; *Re Harrison*, 22 L. J. Ch. 69 (where the power provided for the case of a trustee being incapable, unwilling, or unable, and the event was that a trustee went abroad); *Cooper* v. *Macdonald*, 14 W. R. 755; *Travers* v. *Illingworth*, 2 Dr. & Sm. 345; *Re Dawson's Trusts*, 3 N. R. 39, where a trustee was unable to sign from ill health; see other cases in the last note.

Where trustees disclaim.

Where the application is in consequence of a trustee refusing to act, the disclaimer may be made at the bar of the court, *Foster* v. *Dawber*, 1 Dr. & Sm. 172; *Re Barnes*, Seton, 807. See note (*u*), p. 102, *infra*.

23 & 24 Vict. c. 145.

Many cases where formerly it would have been impracticable to act without the aid of the Court, are now provided for by Lord Cranworth's Act (23 & 24 Vict. c. 145, sects. 27 & 28), which (applying to instruments executed after August 28, 1860, see sect. 34 of the Act), contains large provisions for appointment of new trustees of such instruments in place of trustees, whether appointed by the Court or otherwise; but that statute does not take away the jurisdiction of the Court under this Act, where it is more beneficial to exercise it, *Viscountess D'Adhemar* v. *Bertrand*, 35 Beav. 19.

Whom the Court will appoint.

(*q*) The Court exercises a discretion in appointing new trustees, and as to its general rules and principles in the selection, see *Re Tempest*, 1 L. R. Ch. 485.

Number of trustees.

The Court will under this section, appoint two trustees instead of one (*Re Tunstall*, 4 De G. & Sm. 421; *Plenty* v. *West*, 16 Beav. 336; *Ex parte Wilkinson*, 2 Deac. 151; and *Birch* v. *Cropper*, 2 De G. & Sm. 255; cf. *Re Bathurst*, 2 Sm. & G. 169; *Re Boycott*, 5 W. R. 15, where two new trustees were appointed in addition to two existing trustees, the trust property having greatly increased). But the Court will not, *vice versâ*, appoint one trustee instead of two (*Re Ellison*, 2 Jur. N. S. 62; *Re Porter's Trusts*, 2 Jur. N. S. 349). But under special circumstances two have been appointed instead of three (*Bulkeley* v. *Earl of Eglinton*, 1 Jur. N. S. 994; and see *Emmett* v. *Clarke*, 3 Gif. 32, where it was held that three trustees appointed by deed in the place of four, having had the legal estate conveyed to them, could give a valid discharge). As a general rule, the Court will not appoint an only trustee (see *Re Cooper's Trusts*, l. c.; *Re Dickinson*, 1 Jur. N. S. 724; and see *Viscountess D'Adhemar* v. *Bertrand*, 35 Beav. 20; *Re Roberts*, 9 W. R. 758, where it was said that money would never be paid out of court to an only trustee, unless the estate was substantially represented); but, where the trust was about to be shortly wound up, and there had been originally only one trustee, the Court appointed a sole trustee in the place of a lunatic trustee (*Re Reynault*, 16 Jur. 233).

As to appointing new trustees of one or more specific trusts created by an instrument, and not of the entire instrument, see *Re Garty* and *Re Dennis*, cited in note (*s*), p. 99, *supra*, *Parnell* v. *Hingston*, cited p. 210, *post*.

Not foreigner, nor female,

except as joint trustee.

Cestui que trust.

The Court, under this Act, refused to appoint a foreigner residing permanently abroad (*Re Guibert*, 16 Jur. 852), or a woman, even though unmarried at the time (*Brook* v. *Brook*, 1 Beav. 531), to be a trustee; and see *Lake* v. *De Lambert*, 4 Ves. 595. But in *Re Campbell's Trusts*, 31 Beav. 176, an unmarried lady was appointed jointly with another trustee. A *cestui que trust* may, under special circumstances, be appointed (*Ex parte Clutton*, 17 Jur. 988; *Ex parte Conybeare's Settlement*, 1 W. R. 458), see note (*t*), p. 91, *ante*. Except in cases of absolute necessity, the Master of the Rolls will not appoint a near relative of the parties interested to be a trustee (*Wilding* v. *Bolder*, 21 Beav. 222); but this rule has not been followed by the other judges. A trustee appointed out of court may be reappointed by the Court (*Re Mundell's Trusts*, 2 L. T. N. S. 653). Where, by inadvertence, an alien had been appointed trustee, the Court refused to discharge the order and appoint a new trustee

Near relative.

Trustee already appointed.

Alien.

without the Crown's consent; but on a rehearing, the Crown offering no opposition, a natural-born subject was appointed, *Re Giraud*, 32 Beav. 385. 13 & 14 Vict. c. 60, s. 32.

The Court requires a written consent by the new trustees to act, unless counsel consent on their behalf (*Re Parke's Trust*, 21 L. T. 218; but they need not appear to consent, *Re Draper's Settlement*, 2 W. R. 440). An affidavit of their fitness must be produced (*Re Battersby's Trusts*, 16 Jur. 900; *Re Tunstall's Will*, 15 Jur. 645, 981, where, upon an affidavit of fitness, a reference to the Master was dispensed with). As a general rule, an affidavit of fitness by the solicitor is not enough (*Grundy* v. *Buckeridge*, 22 L. J. Ch. 1007; Lewin, 769). Consent of new trustees necessary; but not appearance. Affidavit of fitness.

Where parties interested objected to the trustees proposed to be appointed, and desired the property to be paid in under the Trustee Relief Act, the Court made an order vesting the property in the proposed trustees, on an undertaking by them to transfer it into court within a month, *Re Dawson's Trusts*, 3 N. R. 397, and see note (*l*), p. 98, *supra*. New trustee to pay into Court.

Before the passing of the Trustee Extension Act, sect. 9, it seems to have been doubted whether the Court could act under this section, when there were no existing trustees (*Re Tyler*, 5 De G. & Sm. 56; *contrà*, *Re Frost*, 15 Jur. 644; *Re Hazeldine*, 16 Jur. 853). Where no existing trustees.

XXXIII. And be it enacted, that the person or persons who, upon the making of such order as last aforesaid, shall be trustee or trustees, shall have all the same rights and powers as he or they would have had if appointed by a decree in a suit duly instituted (*r*). The new trustees to have the powers of trustees appointed by decree in suit.

(*r*) See sect. 15 of Lord St. Leonards' Act, p. 276, *post*, and sect. 27 of Lord Cranworth's Act, 23 & 24 Vict. c. 145, which provides that every trustee *appointed by the Court of Chancery either before or after the passing of this Act*, shall have the same powers, authorities, and discretions, and shall in all respects act as if he had been *originally nominated* a trustee by the deed, will, or other instrument creating the trust; see (before that Act) *Bartley* v. *Bartley*, 3 Drew. 384; *Byam* v. *Byam*, 19 Beav. 66, where the Master of the Rolls held that a discretionary consent to be given by *the undersigned trustees* was annexed to the office, and could be exercised by trustees appointed by the Court, *Oglander* v. *Oglander*, 2 De G. & Sm. 381, where it was held that trustees appointed by the Court had not the power of appointing new trustees in their own place, *Newman* v. *Warner*, 1 Sim. N. S. 457. Powers of trustees appointed by the Court. 23 & 24 Vict. c. 145, s. 27.

XXXIV. And be it enacted, that it shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees (*s*) either by the same or by any subsequent order to direct that any lands subject to the trust shall vest (*t*) in the person or persons who upon the appointment shall be the trustee or trustees for such estate as the Court shall direct (*u*); and such order shall have the same effect as if the person or persons (who before such order were the trustee or trustees, if any) had duly executed all proper conveyance and assignments of such lands for such estates. Power to Court to vest lands in new trustees.

(*s*) Where a mortgagee's executors had, by decree, been ordered to transfer the mortgage debt to the trustees of a settlement, it was held that this was an Vesting lands under decree.

13 & 14 Vict. c. 60, s. 34.

appointment of new trustees by the Court, and that a vesting order of the mortgaged property might be made under this section, *Re Hughes*, 2 H. & M. 695.

(*t*) Under this section "lands" include leaseholds, see note (*b*) to sect. 2.

Whether a declining trustee must execute deed of disclaimer.

(*u*) Before the Court will under this section make an order devesting the estate out of a trustee declining to act, it seems to have been thought by V.-C. Wood that the trustee so declining must execute a deed of disclaimer; a parol disclaimer, on the hearing of the petition, not being sufficient (*Re Ellison*, 2 Jur. N. S. 62). But this *dictum* has been doubted by other judges (see *Foster* v. *Dawber*, 1 Dr. & Sm. 172). So an executor, even though he may not have proved the will, must finally renounce before an order will be made to vest an estate in his co-executor (*Re Badcock's Trusts*, 2 W. R. 386).

Form of order.

For a form of vesting order under this section, see Seton, 804; *Hancox* v. *Spittle*, 3 Sm. & G. 478; and *Re Ellis*, 24 Beav. 426, where the Court directed the circumstances bringing the case within the Act to be inserted in the order. See, too, *Re Mainwaring*, 26 Beav. 172, from which it seems that where the Bank is required to transfer stock, this should always be done.

Vesting in new and old trustees as joint tenants.

The Court may make an order vesting the estate which is outstanding in the old and continuing trustees in the new and continuing trustees as joint tenants (see note to sect. 10), and for the cases on the form, &c. of vesting orders under the Act, see notes (*y*) and (*z*) to sect. 7, *ante*, p. 83.

Power to Court to vest right to sue at law in new trustees.

XXXV. And be it enacted, that it shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order to vest the right to call for a transfer of any stock subject to the trust, or to receive the dividends or income thereof (*v*), or to sue for or recover any chose in action, subject to the trust, or any interest in respect thereof, in the person or persons who upon the appointment shall be the trustee or trustees.

(*v*) See note (*v*) to sect. 5, p. 82, *ante*.

Old trustees not to be discharged from liability.

XXXVI. And be it enacted, that any such appointment by the Court of new trustees, and any such conveyance, assignment, or transfer as aforesaid, shall operate no further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have done (*w*).

(*w*) See note (*o*), p. 98, *ante*.

Who may apply.

XXXVII. And be it enacted, that an order under any of the hereinbefore contained provisions, for the appointment of a new trustee or trustees, or concerning any lands, stock, or chose in action subject to a trust, may be made

upon the application of any person beneficially interested in such lands, stock, or chose in action, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof; and that an order under any of the provisions hereinbefore contained concerning any lands, stock, or chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the monies secured by such mortgage (*x*). 13 & 14 Vict. c. 60, s. 37.

(*x*) On an application for an appointment of new trustees, all the *cestuis que trusts* should be co-petitioners (infants, or lunatics petitioning by their next friends, *Re Fellows*, 2 Jur. N. S. 62; *Re Bourke*, 2 D. J. S. 426); but if they are very numerous some may petition for the class, *Jones* v. *James*, 9 Hare, Appendix, lxxx., and see note (*z*) to 15 & 16 Vict. c. 86, s. 42, p. 197, *post*. Who should petition for new trustees.

Any person having a contingent interest in real estate may apply for a new trustee, *Re Sheppard*, 11 W. R. 60, overruling s. c. 10 W. R. 704. Compare *Ross* v. *Ross*, 12 Beav. 89; *Allan* v. *Allan*, 15 Ves. 130. Person *contingently interested.*

The committee of a lunatic should petition where lands are vested in a lunatic trustee (*Re Wheeler*, 1 D. M. G. 434; and see note to p. 436 of the report). Committee of lunatic.

As to the proper persons to petition in case of the bankruptcy of the trustees, see 12 & 13 Vict. c. 106, s. 130, cited in note to sect. 32, p. 99. In case of bankruptcy.

On an application for a vesting order in pursuance of a decree, the person in whom lands are to be vested (*e. g.* in case of lands sold under a decree, a purchaser who has paid the purchase-money into court) is a proper person to apply as being beneficially interested, *Ayles* v. *Cox*, 17 Beav. 584; and see *Rowley* v. *Adams*, 14 Beav. 130 (in the latter case one petition by the purchasers of several lots was held not multifarious). Creditors who had obtained an administration decree against the debtor's estate were allowed to apply for a vesting order where a sale had been ordered, in *Re Wragg*, 1 D. J. S. 356. Who should petition for vesting order in pursuance of decree.

[The 38th section of this Act provided that application might be made before the Master in the first instance, and the Master might give a certificate of the material facts, and of his opinion that the applicant was entitled to the order; and by sect. 39, the applicant having obtained such certificate, might petition the Court or the Lord Chancellor; but since the abolition of the Master's office by 15 & 16 Vict. c. 80 (see p. 143, *post*), applications under the Act are made by petition in the first instance, see sect. 40, *infra*.]

XL. And be it enacted, that any person or persons entitled in manner aforesaid to apply for an order from the said Court of Chancery, or from the Lord Chancellor, intrusted as aforesaid, may, should he so think fit, present a petition (*y*) in the first instance to the Court of Chancery, or to the Lord Chancellor, intrusted as aforesaid, for such order as he may deem himself entitled to, and may give evidence (*z*) by affidavit or otherwise in support of such petition before the said Court, or the Lord Chancellor, intrusted as aforesaid, and may serve (*a*) Power to present petition in the first instance.

13 & 14 Vict. c. 60, s. 40.

such person or persons with notice of such petition as he may deem entitled to service thereof.

Application by summons or motion.

(*y*) See *supra*, note (*x*). A vesting order in pursuance of a decree for sale must be applied for in chambers, Ord. XXXV. 1, r. 4. And as to where an order is made in a cause, see note to sect. 43, and applications for new trustees, &c., of charities are generally made in chambers, note (*o*), p. 98, *ante*.

Evidence.

Affidavits filed in a cause.

(*z*) In *Re Pickance's Trust*, 10 Hare, App. xxxv., the Court allowed affidavits filed in a cause to be used as evidence on a petition, in the matter of the Acts. See Ord. XVIII. and note; and as to evidence in support of a petition under this Act, see *Re Hoskins*, 4 De G. & J. 436, where on a petition for appointing new trustees of a will containing gifts to classes, an affidavit of the solicitor was received as sufficient evidence of the persons constituting the classes, without the production of baptismal and other certificates.

Service on cestuis que trusts and trustees.

(*a*) The general rule is that all the *cestuis que trusts*, including infants (*Re Fellows*, 2 Jur. N. S. 62), and (in cases of retiring trustees) the old trustees also (*Re Sloper*, 18 Beav. 596) should be served; see *Ex parte Hardman*, 3 Mont. Dea. & De G. 559, where the *cestuis que trusts* were abroad; and *Re Richards's Trusts*, 5 De G. & Sm. 636.

Exceptions.

(1) trustees with a power of sale represent cestuis que trusts.

(2) recusant trustees.

But service on all the *cestuis que trusts*, where they are very numerous, may be dispensed with (*Re Sharpley*, 1 W. R. 271; *Re Smyth*, 2 De G. & Sm. 781), and trustees with a power of sale sufficiently represent their *cestuis que trusts*, *Re Blanchard*, 3 D. F. J. 131; see 15 & 16 Vict. c. 86, ss. 42, 51, pp. 195, 209, *post*), and note to sect. 17 of the Settled Estates Act, p. 244, *post*, and 22 & 23 Vict. c. 35, s. 14, p. 276, *post*.

A trustee *refusing* to transfer need not be served with a petition under the 23rd and 24th sects., see note (*y*), p. 92, *ante*.

Service on remaindermen, reversioners,

lunatic's committee,

assignees of bankrupt,

incumbrancers.

The Court will not make an order on petition of a lessee or tenant for life without service on the remaindermen (*Re Farrant*, 20 L. J. Ch. 532; *Re Maynard*, 16 Jur. 1084; *Re Prescott*, 19 L. T. 375). But where the lease contained no clause prohibiting assignment, an order was made in the absence of the lessor (*Re Matthew's Settlement*, 2 W. R. 85). A petition relating to lands vested in a lunatic trustee must be served upon the committee, *Re Saumarez*, 25 L. J. Ch. 575; *Re Wylde*, 5 D. M. G. 25; and a petition to appoint new trustees in the place of a bankrupt upon his assignees (*Ex parte Carden*, 12 Jur. 391). See further, as to service in the case of bankrupt trustees, *Re Bingley*, 2 Dea. & Ch. 413; *Ex parte Marshall*, 3 De G. & Sm. 670. An order to vest lands subject to an annuity may be made in the absence of the annuitant (*Re Winteringham's Trusts*, 3 W. R. 578).

Note as to service.

At the foot of the petition a statement must be appended of the persons intended to be served, or if no person is intended to be served a statement to that effect must be appended, Ord. XXXIV. 1. See further as to services, the note on costs, note (*h*) to sect. 51, *infra*, p. 109.

What may be done upon petition.

XLI. And be it enacted, that upon the hearing of any such motion or petition it shall be lawful for the said Court or for the said Lord Chancellor, should it be deemed necessary, to direct a reference to one of the Masters in ordinary of the Court of Chancery to inquire into any facts which require such an investigation, or it shall be lawful for the said Court or for the said Lord Chancellor to direct such motion or petition to stand over to enable the petitioner or petitioners to adduce evidence or further evidence before the said Court or before the

said Lord Chancellor, or to enable notice or any further notice of such motion or petition to be served upon any person or persons. 13 & 14 Vict. c. 60, s. 41.

XLII. And be it enacted, that upon the hearing of any such motion or petition, whether any certificate or report from a Master shall have been obtained or not, it shall be lawful for the Court, or the Lord Chancellor, intrusted as aforesaid, to dismiss such motion or petition, with or without costs, or to make an order thereupon in conformity with the provisions of this Act. Court may dismiss petition, with or without costs.

XLIII. And be it enacted, that whensoever, in any cause or matter, either by the evidence adduced therein, or by the admission of the parties, or by a report of one of the Masters of the Court of Chancery, the facts necessary for an order under this Act shall appear to such Court to be sufficiently proved, it shall be lawful for the said Court, either upon the hearing of the said cause or of any petition or motion in the said cause or matter, to make such order under this Act (*b*). Power to make an order in a cause.

(*b*) See note (*h*) to sect. 30, *ante*, p. 96. Generally an order may be made in a cause without a petition, *Wood* v. *Beetleston*, 1 K. & J. 213; *Viscountess D'Adhemar* v. *Bertrand*, 35 Beav. 19; but where the trustee is a lunatic, a petition in lunacy is requisite (see notes (*p*) and (*q*) to sect. 3, p. 81), *Jeffryes* v. *Drysdale*, 9 W. R. 428. Orders under Act made in cause, (1) Without special application; (2) on motion.

Vesting orders in a suit were made on motion in *Mackenzie* v. *Mackenzie*, Seton, 810, 812, where a previous order appointing new trustees had been made in a cause; and see *Re Holbrook's Will*, 8 W. R. 3, where such order had been made on petition in a *matter*, and a subsequent vesting order was made on motion (see, too, *Skynner* v. *Pelichet*, 9 W. R. 191).

XLIV. And be it enacted, that whenever any order shall be made under this Act, either by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, for the purpose of conveying or assigning any lands, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction of the Court of Chancery, or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, Orders made by the Court of Chancery, founded on certain allegations, to be conclusive evidence of the matter contained in such allegations.

13 & 14 Vict. c. 60, s. 44.

or the heir or last surviving devisee of a mortgagee, be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then in any of such cases the fact that the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, has made an order upon such an allegation, shall be conclusive evidence (*c*) of the matter so alleged in any court of law or equity upon any question as to the legal validity of the order: Provided always, that nothing herein contained shall prevent the Court of Chancery directing a reconveyance or re-assignment of any lands conveyed or assigned by any order under this Act, or a redisposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said Court to direct any of the parties to any suit concerning such lands or contingent right to pay any costs occasioned by the order under this Act, when the same shall appear to have been improperly obtained.

Order to be conclusive evidence of facts on which it was founded.

(*c*) See *Collinson* v. *Collinson*, 2 D. M. G. 409, 414.

Trustees of charities.

XLV. And be it enacted, that it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, to exercise the powers herein conferred for the purpose of vesting any lands, stock, or chose in action in the trustee or trustees of any charity (*d*) or society, over which charity or society the said Court of Chancery would have jurisdiction upon suit duly instituted, whether such trustee or trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the said Court of Chancery, or by order made upon a petition to the said Court under any statute authorising the said Court to make an order to that effect in a summary way upon petition.

Application for a vesting order on appointment of new trustees of charity.

(*d*) New trustees of a charity having been appointed under the 16 & 17 Vict. c. 137, s. 28 (see note (*o*), p. 98, *ante*, and note (*f*), to Ord. XLI. 10, *post*), a vesting order under this section was made in chambers (*Re Davenport's Charity*, 4 D. M. G. 839; Seton, 788; Lewin, 610, note (*g*).)

XLVI. And be it enacted, that no lands, stock, or chose

in action vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to her Majesty, her heirs or successors, or to any corporation, lord or lady of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his or her co-trustee, or descend or vest in his or her representative, as if no such attainder or conviction had taken place (*e*).

13 & 14 Vict. c. 60, s. 46.

No escheat of property held upon trust or mortgage.

(*e*) See 4 & 5 Wm. 4, c. 23, s. 3, of which this section is a re-enactment, and notes in Shelford's Real Property Statutes, 665 ; Sugden's Real Property Statutes, 428. By sect. 8 of the Extension Act, p. 115, *post*, the Court has power to appoint new trustees in lieu of persons convicted of felony.

Trustee attainted.

Trustee felons.

XLVII. And be it enacted, that nothing contained in this Act shall prevent the escheat or forfeiture of any lands or personal estate vested in any such trustee or mortgagee, so far as relates to any beneficial interest therein of any such trustee or mortgagee, but such lands or personal estate, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if this Act had not passed (*f*).

Act not to prevent escheat or forfeiture of beneficial interest.

(*f*) See 4 & 5 Wm. 4, c. 23, s. 5, which contains the same provisions, and Sugden, 428, referred to in last note.

XLVIII. And be it enacted, that where any infant or person of unsound mind shall be entitled to any money payable in discharge of any lands, stock, or chose in action conveyed, assigned, or transferred under this Act, it shall be lawful for the person by whom such money is payable to pay the same into the Bank of England, in the name and with the privity of the Accountant-General, in trust in any cause then depending concerning such money, or, if there shall be no such cause, to the credit of such infant or person of unsound mind, subject to the order or disposition of the said Court; and it shall be lawful for the said Court, upon petition in a summary way, to order any money so paid to be invested in the public funds, and to order payment or distribution thereof, or payment of the dividends thereof, as to the said Court shall seem reasonable ; and every cashier of the Bank of

Money of infants and persons of unsound mind to be paid into court.

13 & 14 Vict. c. 60, s. 48.

England who shall receive any such money is hereby required to give to the person paying the same a receipt for such money, and such receipt shall be an effectual discharge for the money therein respectively expressed to have been received.

Court may make a decree in the absence of a trustee.

XLIX. And be it enacted, that where in any suit commenced or to be commenced in the Court of Chancery, it shall be made to appear to the Court by affidavit that diligent search and inquiry has been made after any person made a defendant, who is only a trustee, to serve him with the process of the Court, and that he cannot be found, it shall be lawful for the said Court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to them to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with the process of the Court, and had appeared and filed his answer thereto, and had also appeared by his counsel and solicitor at the hearing of such cause (*g*): Provided always, that no such decree shall bind, affect, or in any wise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors, or administrators, for or in respect of any estate, right, or interest which such person shall have at the time of making such decree, for his own use or benefit, or otherwise than as a trustee as aforesaid.

(*g*) The Court under this section ordered a cause to be certified as fit for hearing though a defendant trustee could not be found, and had not appeared (*Westhead* v. *Sale*, 6 W. R. 52). See, generally, as to dispensing with parties, notes to Chancery Improvement Act, 1852, sect. 42, p. 197, *post*.

15 & 16 Vict. c. 86, s. 42.

[Sect. 50 relates to the practice under the obsolete sections, 38, 39.]

Costs may be paid out of the estate.

LI. And be it enacted, that the Lord Chancellor, intrusted as aforesaid, and the Court of Chancery, may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, assignments, and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the lands or personal estate, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such

manner as the said Lord Chancellor or Court shall think proper (*h*). 13 & 14 Vict. c. 60, s. 51.

(*h*) If a bill is filed for the appointment of a new trustee in a case where a petition might have been presented, the plaintiff will be liable for the additional costs, *Thomas* v. *Walker*, 18 Beav. 521; and as to cases where a bill is necessary, see note (*m*), p. 98. Costs of bill filed unnecessarily.

The costs of applications in the matter of a trust, whether occasioned by the lunacy (*Re Fulham*, 15 Jur. 69), infancy, (*Ex parte Cant*, 10 Ves. 554), or bankruptcy (*Ex parte Painter*, 2 Deac. & Ch. 584), of a trustee, must be borne by the trust estate or the *cestui que trust*, according as the application is for the benefit of the applicant solely, or generally for the benefit of the estate, see *Carter* v. *Sebright*, 26 Beav. 374. In *Ex parte Davies*, 16 Jur. 882, V.-C. Parker, upon appointing a new trustee and making a vesting order under the Act, by consent ordered the new trustee to pay the costs of the proceedings, and directed that such costs, with interest thereon at 4*l.* per cent., should form a charge on the inheritance, and see *Re Crabtree*, 14 W. R. 497, where costs were directed to be raised by mortgage to be settled by the Court. Compare sect. 29 of the Settled Estates Act, *post*. Where new trustees of two funds were applied for, the costs were borne rateably, *Re Grant*, 2 J. & H. 764. Costs of *applications* for benefit of trust property. Charged on trust property.

When a bankrupt trustee is served and appears, he will be allowed his costs (*Re Whitley*, 1 Deac. 478; *Ex parte Cartwright*, 3 De G. & Sm. 648; *Turner* v. *Molineux*, 3 L. T. N. S. 687, where costs as between solicitor and client were given). The costs of the infant heir of an equitable mortgagor, against whom a vesting order had been obtained by the equitable mortgagee, with a view to a sale, were postponed to the costs of the mortgagee in *Wade* v. *Ward*, 4 Drew. 603. And in other cases infant respondents to petitions under the Act have not been required to be served, *Re Tweedy*, 9 W. R. 938; *Re Willan*, *ibid.*, 689 (where service upon the infant heir of a deceased mortgagee was held unnecessary), *Re Wise*, 5 De G. & Sm. 415. Costs of *appearance* of bankrupt trustee; of infant trustee. Where infant respondents need not be served.

The costs of an application for a vesting order as between vendor and purchaser, occasioned by the vendor leaving an infant heir or devisee, must be borne by the vendor's estate, *Heard* v. *Cuthbert*, 2 Ir. Ch. Rep. 369; *Bradley* v. *Munton*, 16 Beav. 294; *Ayles* v. *Cox*, 17 Beav. 584 (where the sale was under a decree), and compare cases cited on sect. 82 of the Lands Clauses Act, note (*m*), p. 54, *ante*. Costs of *vesting order*— (1) As between vendor's estate and purchaser;

The costs of an application for a vesting order as between a mortgagor paying off the mortgage debt and the mortgagee, occasioned by the mortgagee leaving an heir who is an infant, or cannot be found, or is lunatic, are payable by the mortgagor, *Ex parte Ommaney*, 10 Sim. 298; *King* v. *Smith*, 6 Hare, 473; *Re Jones*, 2 D. F. J. 554; *Re Stewart*, 4 De G. & J. 317, Seton, 381. (2) as between mortgagee's estate and mortgagor redeeming.

But if the application was occasioned by the mortgagee himself becoming lunatic, it should be made in lunacy (see note to sect. 3), by the committee of the lunatic's estate, and the committee will have his costs out of the lunatic's estate, *Re Wheeler*, 1 D. M. G. 435; *Ex parte Richards*, 1 J. & W. 164; *Re Townsend*, 2 Ph. 348; *Re Thomas*, 22 L. J. Ch. 858 (where the mortgagor had to bear the cost of the stamp imposed by the Extension Act). If, however, the lunatic mortgagee appears on the face of the mortgage-deed to be only a trustee, the *cestui que trust* pays the costs, *Re Lewes*, 1 M. & G. 23; see *Re Townsend*, *ibid.* 686. And if the mortgagor makes the application in a case where the committee of the lunatic has not declined to act, he must bear the costs, *Re Wheeler*, 1 D. M. G. 435. Where mortgagee lunatic.

It was held in *Re Primrose*, 23 Beav. 590, that the Court has no jurisdiction under the Act to order a respondent to pay the costs of a vesting order occasioned by his own misconduct (but see *Attorney-General* v. *Murdoch*, 2 K. & J. 571, where *in a suit* the costs of appointing new trustees were ordered to be paid by trustees who improperly refused to retire; and *Legg* v. *Makrell*, 1 Gif. 165, reversed on appeal, 4 L. T. N. S. 568; *Grierson* v. *Astle*, 3 L. T. N. S. 288; *King* v. *King*, 1 De G. & J. 663; *Palairet* v. *Carew*, 32 Beav. 564. See, too, the cases collected in note (*k*) to 10 & 11 Vict. c. 96, s. 1, *ante*, pp. 67, 68). Where a trustee on a petition to appoint new trustees Costs of respondent trustees in case of *misconduct*.

13 & 14 Vict. c. 60, s. 51.

disclaims at the bar he will only be allowed costs as between party and party (*Bulkeley* v. *Earl of Eglinton*, 1 Jur. N. S. 994; and see *Norway* v. *Norway*, 2 M. & K. 278, overruling *Sherratt* v. *Bentley*, 1 R. & M. 655; and *Legg* v. *Makrell*, *ante*).

Costs in chambers.

As to the costs incidental to an inquiry in chambers, see note to 15 & 16 Vict. c. 80, s. 27, p. 148, *post*.

Commission concerning person of unsound mind.

LII. And be it enacted, that upon any petition being presented under this Act to the Lord Chancellor, intrusted as aforesaid, concerning a person of unsound mind, it shall be lawful for the said Lord Chancellor, should he so think fit, to direct that a commission in the nature of a writ de lunatico inquirendo shall issue concerning such person, and postpone making any order upon such petition until a return shall have been made to such commission (*i*).

(*i*) See notes to sect. 3, and note (*p*) to sect. 32, p. 99, *ante*.

Suit may be directed.

LIII. And be it enacted, that upon any petition under this Act being presented to the Lord Chancellor, intrusted as aforesaid, or to the Court of Chancery, it shall be lawful for the said Lord Chancellor or the said Court of Chancery to postpone making any order upon such petition until the right of the petitioner or petitioners shall have been declared in a suit duly instituted for that purpose (*k*).

Cases where suit directed.

(*k*) When lands were bought by a father in the name of his son, Lord Cranworth, C., refused, on a petition, under this Act, though founded on the certificate of the Master, under the 38th section, to make an order, having the effect of a declaration, that the purchase did not amount to an advancement, but directed a bill to be filed (*Collinson* v. *Collinson*, 3 D. M. G. 409; and see *Devoy* v. *Devoy*, 3 Sm. & G. 403; and *Re Burt*, 9 Hare, 289; and note (*h*) p. 97, *ante*. In the latter case also a bill was directed to be filed. See, too, *Re Draper*, 9 W. R. 805).

Powers of Court of Chancery to extend to property in the colonies.

LIV. And be it enacted, that the powers and authorities given by this Act to the Court of Chancery in England shall extend to all lands and personal estate within the dominions, plantations, and colonies belonging to Her Majesty (except Scotland) (*l*).

Lands in — Canada. Ireland.

(*l*) Under this section a vesting order was made as to lands in Canada (*Re Schofield*, 24 L. T. 322; *Re Groom*, 11 L. T. N. S. 336). As to lands in Ireland, see *Re Davies*, 3 Mac. & G. 278, where the Lord Chancellor held that an order could not be made to vest such estates in a trustee appointed in the place of a lunatic trustee (see *post*, ss. 55, 56, 57). But when the *cestui que trust* was in England, and the surviving trustee in Ireland, V.-C. Kindersley made an order vesting lands situate in Ireland in a new trustee appointed by the Court (*Re Hewitt's Estate*, 6 W. R. 537).

13 & 14 Vict. c. 60, s. 55.

LV. And be it enacted, that the powers and authorities given by this Act to the Court of Chancery in England shall and may be exercised in like manner and are hereby given and extended to the Court of Chancery in Ireland with respect to all lands and personal estate in Ireland.

Powers given to Court of Chancery may be exercised by that Court in Ireland.

Powers of Lord Chancellor in Lunacy to extend to property in the colonies.

LVI. And be it enacted, that the powers and authorities given by this Act to the Lord Chancellor of Great Britain, intrusted as aforesaid, shall extend to all lands and personal estate within any of the dominions, plantations, and colonies belonging to Her Majesty (except Scotland and Ireland).

Powers of Lord Chancellor in Lunacy may be exercised by Lord Chancellor of Ireland.

LVII. And be it enacted, that the powers and authorities given by this Act to the Lord Chancellor of Great Britain, intrusted as aforesaid, shall and may be exercised in like manner by and are hereby given to the Lord Chancellor of Ireland, intrusted as aforesaid, with respect to all lands and personal estate in Ireland.

Short title.

LVIII. And be it enacted, that in citing this Act in other Acts of Parliament, and in legal instruments and in legal proceedings, it shall be sufficient to use the expression the "Trustee Act, 1850."

Commencement of Act.

LIX. And be it enacted, that this Act shall come into operation on the first day of November, one thousand eight hundred and fifty (*m*).

Appeals from orders under the Act.

(*m*) No right of appeal to the House of Lords is given by this statute, and as such right of appeal is expressly given by sect. 2 of the Trustee Relief Act, and by Sir G. Turner's Act, 13 & 14 Vict. c. 35, s. 33, and other acts conferring summary remedies, it seems doubtful whether in the absence of that clause such an appeal will lie.

See, however, *Re Teynham*, 11 Price, 667, where the House of Lords heard an appeal from an order made on a petition as to guardianship; and compare note (*q*), *ad finem*, p. 284, *post*.

TRUSTEE EXTENSION ACT, 1852.

15 & 16 VICT. CAP. 55.

An Act to extend the provisions of the "Trustee Act, 1850." [30*th June*, 1852.

15 & 16 Vict. c. 55.

WHEREAS it is expedient to extend the provisions of the Trustee Act, 1850; Be it therefore enacted by the

15 & 16 Vict. c. 55.

Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same:

Court of Chancery may make an order for vesting the estate, in lieu of conveyance by a party to the suit after a decree or order for sale.

I. That when any decree or order (*a*) shall have been made by any Court of Equity directing the sale of any lands for any purpose whatever (*b*), every person seised or possessed of such land, or entitled to a contingent right therein, being a party to the suit or proceeding in which such decree or order shall have been made, and bound thereby or being otherwise bound by such decree or order, shall be deemed to be so seised or possessed or entitled (as the case may be) upon a trust within the meaning of the Trustse Act, 1850; and in every such case it shall be lawful for the Court of Chancery, if the said Court shall think it expedient for the purpose of carrying such sale into effect, to make an order vesting such lands or any part thereof (*c*), for such estate as the Court shall think fit, either in any purchaser or in such other person as the Court shall direct; and every such order shall have the same effect as if such person so seised or possessed or entitled had been free from all disability, and had duly executed all proper conveyances and assignments of such lands for such estate.

Section retrospective.

(*a*) This section applies retrospectively to a decree made before the passing of the Act, *Wake* v. *Wake*, 17 Jur. 545, cited in note to sect. 16 of the "Trustee Act, 1850."

29th section of Trustee Act, 1850.

(*b*) See the 29th section of the "Trustee Act, 1850," which only applied to a sale for payment of *debts*.

(*c*) See as to vesting orders, note (*y*), *ante*, p. 83.

Power to make an order for vesting the estate, on refusal or neglect of a trustee to convey or release.

II. That sections numbered 17 and 18 in the Queen's Printer's copy of the Trustee Act, 1850, be repealed; and in every case where any person is or shall be jointly or solely seised or possessed of any lands or entitled to a contingent right therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance or assignment of such lands, or a duly authorised agent of such last-mentioned person, requiring such trustee to convey or assign the same, or to release such contingent right, it shall be

lawful for the Court of Chancery, if the said Court shall be satisfied that such trustee has wilfully refused or neglected to convey or assign the said lands for the space of twenty-eight days after such demand, to make an order vesting such lands in such person (*d*), in such manner and for such estate as the Court shall direct, or releasing such contingent right in such manner as the Court shall direct; and the said order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands, or a release of such right, in the same manner and for the same estate (*e*). 15 & 16 Vict. c. 55, s. 2.

(*d*) See note (*h*), p. 87, and sect. 23 of the former Act, p. 91, *ante*.

(*e*) For form of order under this section, see Seton, 809; *Knight* v. *Knight*, 14 L. T. N. S. 161, and see *ante*, p. 83, note (*y*), as to vesting orders. Vesting Orders.

III. That when any infant shall be solely entitled to any stock (*f*) upon any trust, it shall be lawful for the Court of Chancery to make an order vesting in any person or persons (*g*) the right to transfer such stock, or to receive the dividends or income thereof (*h*); and when any infant shall be entitled jointly with any other person or persons to any stock upon any trust, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, either in the person or persons jointly entitled with the infant, or in him or them together with any other person or persons the said Court may appoint. Power to make an order for the transfer or receipt of dividends of stock in name of an infant trustee.

(*f*) The former Act contained no provision for the case of an infant trustee of stock, see *Cramer* v. *Cramer*, 16 Jur. 331; *Devoy* v. *Devoy*, 3 Sm. & G. 403. Infant trustee of stock.

(*g*) In *Re Morgan*, Seton, 825, the right was vested in the infant's guardian. See, too, *Re Thornton*, 9 W. R. 475, cited in notes to "Trustee Act, 1850," s. 31, p. 98. Where an infant was beneficially entitled to stock standing in his own name, an order declaring him trustee of such stock, and directing a transfer under this section, was held informal, and an order was substituted under 1 Will. 4, c. 65, s. 32; *Re Westwood*, 6 N. R. 61, 316. See, however, *Sanders* v. *Homer*, 6 W. R. 476. Infant beneficially entitled.

(*h*) See note (*v*), p. 82, *ante*.

IV. That where any person shall neglect or refuse to transfer any stock, or to receive the dividends or income thereof, or to sue for or recover any chose in action, or any interest in respect thereof, for the space of twenty-eight days next after an order of the Court of Chancery for that purpose shall have been served upon him, it shall On neglect to transfer stock for 28 days order may be made vesting right to transfer in such person as the Court shall appoint.

15 & 16 Vict. c. 55, s. 4.

be lawful for the Court of Chancery to make an order vesting all the right of such person to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said Court may appoint (*i*).

Vesting order of stock.

(*i*) See sect. 23 of the former Act, and for form of order under this section, see Seton, 810.

Order may be made on motion.

The order under this section, may, it seems, be made on *motion* (*Re Holbrook's Will*, 8 W. R. 3; *Skynner* v. *Pelichet*, 9 W. R. 191, cited, *ante*, in note to sect. 43 of former Act, p. 105). The order made under this section must not deal with a larger subject-matter than the order which it is designed to enforce (*ibid*).

On like neglect by executor, similar order may be made.

V. When any stock shall be standing in the sole name of a deceased person, and his personal representative shall refuse or neglect to transfer such stock or receive the dividends or income thereof for the space of twenty-eight days next after an order of the Court of Chancery for that purpose shall have been served upon him, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said Court may appoint.

Bank of England and companies to comply with such orders.

VI. When any order being or purporting to be under this Act, or under the Trustee Act, 1850, shall be made by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, vesting the right to any stock, or vesting the right to transfer any stock, or vesting the right to call for the transfer of any stock, in any person or persons, in every such case the legal right to transfer such stock shall vest accordingly (*k*); and the person or persons so appointed shall be authorised and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names, or otherwise, to the extent and in conformity with the terms of the order; and the Bank of England and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent

and in conformity with the terms of such order, as the said Bank of England, or such companies, associations, or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made. 15 & 16 Vict. c. 55, s. 6.

(*k*) This enactment was rendered necessary by *Re Smyth's Settlement*, 4 De G. & Sm. 499, which decided that the former Act only gave the right to call for a transfer of the stock. See note (*v*), p. 82, *ante*. Re Smyth's Settlement.

VII. That every order made or to be made, being or purporting to be made under this or the Trustee Act, 1850, by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, and duly passed and entered, shall be a complete indemnity to the Bank of England, and all companies and associations whatsoever, and all persons, for any act done pursuant thereto; and it shall not be necessary for the Bank of England, or such company or association, or person to inquire concerning the propriety of such order, or whether the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery had jurisdiction to make the same. Indemnity to Bank and companies so obeying.

VIII. That when any person is or shall be jointly or solely seised or possessed of any lands or entitled to any stock upon any trust, and such person has been or shall be convicted of felony, it shall be lawful for the Court of Chancery, upon proof of such conviction, to appoint any person to be a trustee in the place of such convict, and to make an order for vesting such lands, or the right to transfer such stock, and to receive the dividends or income thereof, in such person to be so appointed trustee; and such order shall have the same effect as to lands as if the convict trustee had been free from any disability, and had duly executed a conveyance or assignment of his estate and interest in the same (*l*). Power to appoint new trustees in lieu of persons convicted of felony.

(*l*) See note (*e*), *ante*, p. 107, as to escheat of trust property.

IX. That in all cases where it shall be expedient to appoint a new trustee, and it shall be found inexpedient, difficult, or impracticable (*m*) so to do without the assistance of the Court of Chancery, it shall be lawful for the Power to the Court to appoint new trustees where there is no existing trustee.

15 & 16 Vict. c. 55, s. 9.

said Court to make an order appointing a new trustee or new trustees, whether there be any existing trustee or not at the time of making such order (*n*).

(*m*) See *ante*, pp. 98, 99.

Where no existing Trustee.

(*n*) See note (*q*) p. 100, to the 32nd section of the "Trustee Act, 1850," as to the necessity for this provision.

Chancellor may make order for appointment of trustees, without it being necessary that it should be made in Chancery, &c.

X. In every case in which the Lord Chancellor, intrusted as aforesaid, has jurisdiction under this Act, or the Trustee Act, 1850, to order a conveyance or transfer of land or stock, or to make a vesting order, it shall be lawful for him also to make an order appointing a new trustee or new trustees in like manner as the Court of Chancery may do in like cases, without its being necessary that the order should be made in Chancery as well as in lunacy, or be passed and entered by the Registrar of the Court of Chancery (*o*).

Jurisdiction in lunacy.

(*o*) See *Re Waugh's Trust*, 2 D. M. G. 279; and note (*q*) to the 3rd section of the former Act, *ante*, p. 81.

As to powers of persons intrusted with the care of lunatics.

XI. That all the jurisdiction conferred by this Act, on the Lord Chancellor, intrusted by virtue of the Queen's Sign Manual with the care of the persons and estates of lunatics, shall and may be had, exercised, and performed by the person or persons for the time being intrusted as aforesaid.

Act to be construed as part of Trustee Act, 1850.

XII. That this Act shall be read and construed according to the definitions and interpretations contained in the second section of the Trustee Act, 1850, and the provisions of the said last-mentioned Act (except so far as the same are altered by or inconsistent with this Act) shall extend and apply to the cases provided for by this Act, in the same way as if this Act had been incorporated with and had formed part of the said Trustee Act, 1850.

All orders made under Trustee Act, 1850, or this Act to be chargeable with the same stamp duty as deeds of conveyance.

XIII. That every order to be made under the Trustee Act, 1850, or this Act, which shall have the effect of a conveyance or assignment of any lands, or a transfer of any such stock as can only be transferred by stamped deed, shall be chargeable with the like amount of stamp duty as it would have been chargeable with if it had been a deed executed by the person or persons seised or pos-

sessed of such lands, or entitled to such stock; and every such order shall be duly stamped for denoting the payment of the said duty (*p*). 15 & 16 Vict. c. 55, s. 13.

(*p*) By 24 & 25 Vict. c. 91, s. 30, where several deeds are necessary for the appointment of new trustees, only one is to be liable to full duty, and the others are to be stamped as counterparts. Stamp.

AN ACT TO DIMINISH DELAY IN CHANCERY.

13 & 14 VICT. CAP. 35.

An Act to diminish the Delay and Expense of Proceedings in the High Court of Chancery in England.

[15*th July*, 1850.

13 & 14 Vict. c. 35.

WHEREAS proceedings in the High Court of Chancery in England are attended with great delay and expense, which it is expedient to diminish: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it shall be lawful for persons interested or claiming to be interested in any question cognizable in the said Court as to the construction of any Act of Parliament, will, deed, or other instrument in writing, or any article, clause, matter, or thing therein contained, or as to the title or evidence of title to any real or personal estate contracted to be sold or otherwise dealt with, or as to the parties to or the form of any deed or instrument for carrying any such contract into effect, or as to any other matter falling within the original jurisdiction of the said Court as a Court of Equity, or made subject to the jurisdiction or authority of the said Court by any statute not being one of the statutes relating to bankrupts, and including among such persons all lunatics (*a*), married women, and infants, in the manner and under the restrictions hereinafter contained, to concur

Power to persons interested in questions cognizable in Court of Chancery to state special cases for the opinion of the Court.

13 & 14 Vict. c. 35, s. 1.

in stating such questions in the form of a special case (*b*) for the opinion of the said Court, and it shall also be lawful for all executors, administrators, and trustees to concur in such case (*b*).

Lunatic.

(*a*) See sect. 34 as to the meaning of lunatic.

Form of special case.

(*b*) For the form of a special case, see sects. 7, 8, 10, *post*, and Ord. 6 March, 1860, r. 16, *post*, and Daniell, 1684; and as to setting it down for hearing, see sects. 12, 13; and as to the orders which will be made on special cases, see sect. 14, *post*.

Parties to special case.

All parties beneficially interested in *all* the questions to be determined by a special case must be made parties, see *Entwisle* v. *Cannon*, 4 W. R. 450; but see sects. 42, 44, 51, of the Chancery Improvement Act, 1852, as to persons representing classes.

15 & 16 Vict. c. 86, ss. 42, 44, & 51.

Sects 44 & 51 of that Act have been held to apply to special cases; *Re Brown*, 29 Beav. 401; *Swallow* v. *Binns*, 9 Hare, App. xlvii.

Trustees.

But where a special case seeks to have the construction of the trust deed determined the trustees ought to be parties, *Vorley* v. *Richardson*, 8 D. M. G. 126, overruling *Darby* v. *Darby*, 18 Beav. 412.

Amendment.

Amendment of a special case is allowed, *Thistlethwaite* v. *Garnier*, 5 De G. & Sm. 73, where it had been set down for hearing; *Domville* v. *Lamb*, 9 Hare, App. lv.; *Bell* v. *Cade*, 2 J. & H. 122, where amendment was allowed at the hearing; and see Daniell, 1684.

Revivor.

Special cases may be revived on abatement, *Wilson* v. *Whateley*, 1 J. & H. 331; and see *Ainsworth* v. *Alman*, 14 Beav. 597, in which case revivor would have been more proper; see note (*f*) to sect. 52 of the Chancery Improvement Act, 1852, *post*, p. 211.

15 & 16 Vict. c. 86, s. 52.

How lunatic may concur.

II. And be it enacted, that the committee of the estate of any lunatic interested or claiming to be interested in any such question as aforesaid may, after having been authorised in that behalf by the Lord Chancellor (*c*), concur in such case in his own name and in the name and on the behalf of the lunatic.

(*c*) This includes the Lords Justices, see note (*q*), p. 81, *ante*.

How married women may concur.

III. And be it enacted, that a husband interested or claiming to be interested in the right of his wife in any such question as aforesaid may concur in such case in his own name and in the name of his wife where the wife has no claim to any interest distinct from her husband, and that a married woman having or claiming any interest in any such question as aforesaid distinct from her husband may in her own right concur in such case, provided that her husband also concurs therein.

How infant may concur.

IV. And be it enacted, that the guardian (*d*) of any infant interested or claiming to be interested in any such question as aforesaid may concur in such case in the name and on the behalf of the infant, unless such guardian has

an interest in such question adverse to the interest of the infant therein. 13 & 14 Vict. c. 35, s. 4.

(*d*) See sect. 34 as to the meaning of "guardian."

How special guardian to be appointed for a lunatic not found such by commission, and for infant.

V. And be it enacted, that it shall be lawful for the said Court, by order to be made in the matter of any lunatic not found such by inquisition, or, in the matter of any infant, upon the application of any person on the behalf of such lunatic, or upon the application of such infant, by motion or petition, to appoint any person shown by affidavit to be a fit person, and to have no interest adverse to the interest of the lunatic or infant, to be the special guardian of such lunatic or infant for the purpose of concurring in such case, in the name and on behalf of the lunatic or infant, and any such person so appointed may lawfully so concur: Provided always, that it shall be lawful for the said Court to require notice of such application to be given to such person, if any, as the Court shall think fit (*e*).

(*e*) An application for a guardian *ad litem*, or special guardian under this section, must be made in court (*Thornhill* v. *Copleston*, 10 Hare, App. lxvii); and by *motion* (*Re Goodfellow*, 1 W. R. 446). But it need not be made by a next friend (*Ex parte Craig*, 15 Jur. 762). The application should be supported by an affidavit of the fitness of the proposed guardian, and that he has no interest adverse to the infant (*Ex parte Craig*). The affidavit must be entitled not only "In the matter of the infant," but also "In the matter of the Act" (*Star* v. *Newberry*, 20 Beav. 14). It is irregular to entitle the affidavit "In the special case, &c." because at the time when the affidavit is filed the special case is not yet on the file (*ibid.*), *Maddison* v. *Skein*, 6 L. T. N. S. 20. Application how made. Evidence.

When the father of an infant having no adverse interest is a party to the special case, it is not necessary to appoint a guardian *ad litem* (*Ellis* v. *Guitton*, 18 L. T. 260). Where guardian ad litem unnecessary.

As to notice of the application for guardian *ad litem*, compare notes to Ord. VII. 3.

Order to appoint special guardian of an infant may be discharged by Court if made without notice.

VI. And be it enacted, that in any case in which any such order as aforesaid shall have been made by the said Court in the matter of any infant without notice to the guardian of the infant, it shall be lawful for the said Court, if it shall think fit so to do, to discharge such order, upon the application of such guardian, by motion or petition; and the said Court, if it shall think fit, may thereupon appoint some other fit person to be the special guardian of such infant for the purpose of such special case, and may also give such directions as may be neces-

13 & 14 Vict. c. 35, s. 6.

sary for substituting in such special case either the name of the guardian so applying, or of the special guardian so appointed in lieu of the name of the special guardian so displaced: Provided always, that the discharge of any order appointing a special guardian shall not invalidate anything which shall in the meantime have been done by such special guardian, unless the Court shall, upon notice to all parties, specially so direct.

How such special cases to be entitled.

VII. And be it enacted, that every such special case shall be entitled as a cause between some or one of the parties interested or claiming to be interested as plaintiffs or plaintiff, and the others or other of them as defendants or defendant (*f*); and that in the title to such cases lunatics and infants shall be described as such, and their committees, guardians, or special guardians named; and that where in any such case a married woman is named as a plaintiff and her husband as a defendant thereto, a next friend of such married woman shall be named in the title to such case.

Form of special case: where creditor sues on behalf of himself and others.

(*f*) See *ante*, note (*b*), p. 118. Where a creditor of a deceased person is named as plaintiff in a special case, the record should not be entitled "Between such creditor *on behalf of himself and all other creditors*, plaintiffs, and defendants," such creditors not being before the Court, and therefore not bound by the proceedings (*Lee* v. *Head*, 1 K. & J. 625).

Form of special case.

VIII. And be it enacted, that every such special case shall concisely state such facts and documents as may be necessary to enable the Court to decide the question raised thereby (*g*); and that upon the hearing of such case the Court and the parties shall be at liberty to refer to the whole contents of such documents; and the Court shall be at liberty to draw from the facts and documents stated in any such special case any inference which the Court might have drawn therefrom if proved in a cause.

Facts and documents to be stated.

(*g*) See *ante*, note (*b*), p. 118, and as to stating documents, sect. 18, *post*. When a material fact had been inadvertently omitted in the special case, but appeared to be recognised by all parties, the Court introduced a preface before the order, stating the circumstances, from which it appeared that the fact in question had been so recognised (*Lane* v. *Debenham*, 17 Jur. 1005). Unless the facts are fairly and fully stated the Court may decline to make any order, *Bulkeley* v. *Hope*, 8 D. M. G. 36. The Court cannot act on inferences or belief of the parties, and therefore where a special case only stated with reference to the date of a memorandum which was of importance,

Not mere belief or inference.

that the parties *believed*, &c. the case was ordered to stand over to be amended by stating all the facts which could be ascertained, and verifying, if necessary by affidavit, that no further evidence could be given on the subject, *Domville* v. *Lamb*, 9 Hare, App. lv.

Special case to state how guardian constituted, and the concurrence of married women.

IX. And be it enacted, that every such special case to which an infant or lunatic is a party by his guardian or special guardian shall also state how such guardian or special guardian was constituted; and that where any married woman having or claiming any interest distinct from her husband is a party to such case, it shall be stated therein that she concurs in such case in her own right.

Special cases to be signed by counsel, and filed, and appearances to be entered by defendants.

X. And be it enacted, that every such special case shall be signed by counsel (*h*) for all parties, and shall be filed in the same manner as bills are filed, and that the defendants may appear thereto (*i*) in the same manner as defendants appear to bills; and that no defendant shall be required to take an official copy of a special case, but an office copy thereof shall be taken by the plaintiff.

Signature by counsel.

(*h*) The same counsel may, it seems, sign a special case for all the parties (*Ex parte Craig*, 15 Jur. 762). It is enough if counsel's signature be appended to the *draft* (*Stapleton* v. *Stapleton*, 17 L. T. 15; vid. *Coppeard* v. *Mayhew*, 22 L. J. Ch. 408). The interests of infants should, however, at the hearing at least, be protected by different counsel, even where one solicitor appears for all parties (*Wright* v. *Woodham*, 17 L. T. 293).

Appearance.

(*i*) Appearance *de novo* is necessary after amendment, *Thistlethwaite* v. *Garnier*, 5 De G. & Sm. 73.

After a special case filed, parties to be bound by statements after defendants have appeared, except married women, infants, and lunatics, who are not to be bound till leave given by Court to set it down.

XI. And be it enacted, that after a special case shall have been filed, and the defendants shall have appeared thereto, all the parties to such special case shall be subject to the jurisdiction of the Court in the same manner as if the plaintiff in the special case had filed a bill against the parties named as defendants thereto, and such defendants had appeared to such bill; and upon the special case being filed, and appearances entered thereto as aforesaid, all parties to such special case, other than married women, infants, and lunatics, shall, for the purposes of such special case, be bound by the statements therein: and that married women, infants, and lunatics (*k*) made parties to a special case, shall for the purpose of such special case, be bound by the statements therein, when, and not before, leave shall have been given by the Court

13 & 14 Vict. c. 35, s. 11.

to set down such special case in manner hereinafter provided.

(*k*) As to the meaning of this word, see *post*, sect. 34, p. 134.

How case to be set down for hearing.

XII. And be it enacted, that so soon as all the defendants shall have appeared to the special case the same may, subject to the provisions hereinafter contained, be set down for hearing, and subpœnas to hear judgment issued and served according to the practice of the said court (*l*).

Setting down special case.

(*l*) As to the evidence on which the Court gives leave to set the special case down, see next section, Daniell, 1686; Seton, 32; and for form of order to set it down, Seton, 33.

As to *subpœnas* to hear judgment, see Ord. XXI. 1; and see Daniell, 1687, note (*m*).

How to be heard.

The Master of the Rolls refused to allow a special case to be taken out of its turn in the paper, though marked "short" (1 W. R. 10). But in the later case of *Dale* v. *Atkinson*, 3 Jur. N. S. 41, V.-C. Wood allowed this to be done. So, by leave, it may be set down among the petitions (*Ex parte Craig*, 15 Jur. 762); or before the Court of Appeal, in the first instance (*Palmer* v. *Symonds*, 1 W. R. 122; *Mortimore* v. *Mortimore*, 7 W. R. 601; *Tassell* v. *Smith*, 2 De G. & J. 713).

Amendment at hearing. Decree.

Amendment of a special case has been allowed at the hearing, see note (*b*) to sect. 1, *ante*, p. 118.

As to the orders which will be made at the hearing, see note to sect. 14.

When a married woman, infant, or lunatic is a party, application to be made to the Court for leave to set the case down.

XIII. And be it enacted, that when any married woman, infant, or lunatic is party to a special case, application may be made to the Court by motion for leave to set down the same, of which motion notice shall be given to every party to such case in whom, as executor, administrator, or trustee, any property in question therein is or is alleged to be vested in trust for or for the benefit of such married woman, infant, or lunatic, and also, if such application be not made by or on behalf of such married woman, infant, or lunatic, to such married woman and her husband, or to such infant, or to such lunatic and his committee, if any, as the case may be; and that upon the hearing of such motion the said Court may give leave to set down (*m*) such case if it shall be of opinion that it is proper that the question raised therein shall be determined thereon, and shall be satisfied by affidavit or other sufficient evidence, that the statements contained therein, so far as the same affect the interest of such married woman, infant, or lunatic, are true, but otherwise may

refuse such application: Provided always, that in case the said Court, upon the hearing of such application, shall be of opinion that it is proper that the question raised in such case shall be determined thereon, but shall not be satisfied that the statements contained therein, so far as they affect the interest of such married woman, infant, or lunatic, are true, it shall be lawful for the said Court to refer it to one of the Masters thereof to make such inquiries as to the Court shall seem proper, and upon further application being made, by motion as aforesaid, upon the said Master's report, to give or refuse leave to set down such case as to the said Court shall seem fit (*n*). 13 & 14 Vict. c. 35, s. 13.

(*m*) The application to set down the special case under this section must be made in court (*Sidebotham* v. *Watson*, 1 W. R. 229). Setting down.

(*n*) See note to last section as to the mode of setting down special cases.

XIV. And be it enacted, that it shall be lawful for the said Court, upon the hearing of any such special case as aforesaid, to determine the questions raised therein, or any of them, and by decree to declare its opinion thereon, and, so far as the case shall admit of the same, upon the right involved therein, without proceeding to administer any relief consequent upon such declaration; and that every such declaration of the said Court contained in any such decree shall have the same force and effect as such declaration would have had, and shall be binding to the same extent as such declaration would have been, if contained in a decree made in a suit between the same parties instituted by bill (*o*): Provided always, that it shall be lawful for the said Court, if it shall see fit so to do, before proceeding to make such decree as aforesaid, to send any case or cases for the opinion of any of Her Majesty's Courts of Common Law (*p*), reserving the consideration of all further directions and of the costs (*q*), and to make such decree as aforesaid upon such further directions: Provided also, that if upon the hearing of such special case as aforesaid the Court shall be of opinion that the questions raised thereby, or any of them, cannot properly Upon hearing, Court to determine question and make declaration. Proviso that a case may be sent to Common Law Court. Proviso that Court may refuse to decide.

13 & 14 Vict. c. 35, s. 14.

be decided upon such case, the said Court may refuse to decide the same.

Evidence.

(*o*) As to what facts and documents must be stated, see sect. 8, *supra*, and note thereto.

Appeal.

The decree may be appealed from, see ss. 33 & 16.

What the Court will decide on special case.

On a special case the Court has decided a question of election, and directed accounts, *Schroder* v. *Schroder*, Kay, 578; see *Evans* v. *Saunders*, 1 Dr. 415, 654; *Day* v. *Day*, 18 Jur. 1013; and compare cases on sect. 2 of the Trustee Relief Act, *ante*, p. 71.

Questions of construction.

But generally the Court will only give its *opinion* on questions of construction, and not bind the rights of parties, *Bailey* v. *Collett*, 23 L. J. 230; and as to special cases between vendor and purchaser, and the questions which the Court will or will not decide thereon, see *Leslie* v. *Thompson*, 9 Hare, 268; and *Wilson* v. *Bennett*, 20 L. J. Ch. 279; and compare *Edwards* v. *Milbank*, 4 Drew. 606.

Declarations of future rights.

It seems that the Court has no jurisdiction upon a special case to make binding declarations of future rights (*Burt* v. *Sturt*, 1 W. R. 145; *Greenwood* v. *Sutherland*, 10 Hare, App. xii.; *Garlick* v. *Lawson*, 10 Hare, App. xiv.; *Gosling* v. *Gosling*, Jo. 265. But see *Earl of Tyrone* v. *Marquis of Waterford*, 1 D. F. J. 613. But in *Bell* v. *Cade*, 2 J. & H. 122, it was held that the Court might declare whether a person claiming a future right in remainder took such an interest in the property in question as to entitle him to file a bill to have it secured for his benefit.

15 & 16 Vict. c 86, s. 50.

Compare notes on 15 & 16 Vict. c. 86, s. 50, *post* p. 208, which provides that no suit shall be objected to because only a declaratory decree is sought, and notes to sect. 3 of Lord Cairns' Act, *post*.

21 & 22 Vict. c. 27, s. 3.

(*p*) See now 15 & 16 Vict. c. 86, ss. 61, 62, *post*, and notes to sect. 3 of Lord Cairns' Act, *post*.

Costs.

(*q*) See, as to costs under this Act, note to sect. 32, *post*.

Protection to be afforded to trustees by declaration.

XV. And be it enacted, that every executor, administrator, trustee, or other persons making any payment or doing any act in conformity with the declaration contained in any decree made upon a special case shall in all respects be as fully and effectually protected and indemnified by such declaration as if such payment had been made or act done under or in pursuance of the express order of the said Court made in a suit between the same parties instituted by bill, save only as to any rights or claims of any person in respect of matters not determined by such declaration.

The Court may suspend the acting upon declaration.

XVI. And be it enacted, that where any person shall be desirous to have a special case reheard, or to appeal from the decision thereon, it shall be lawful for the said Court, upon application for that purpose, either at the time of the decree upon such special case being made or at any time afterwards, and upon such conditions, if any, as the Court shall think fit, to order that the declaration contained in such decree shall not be acted upon for such time as the said Court shall think just.

13 & 14 Vict. c. 35, s. 17.

Special case to be a lis pendens, and may be registered.

XVII. And be it enacted, that the filing of a special case, and the entering of appearances thereto by the persons named as defendants therein, shall be taken to be a lis pendens, and may be registered under the provisions of an Act made and passed in the second year of the reign of her present Majesty, intituled "An Act for the better Protection of Purchasers against Judgments, Crown Debts, Lis pendens, and Fiats in Bankruptcy" (*r*), in like manner as any other lis pendens in a Court of Equity may now be so registered, and, unless and until so registered, shall not bind a purchaser or mortgagee without express notice thereof.

2 & 3 Vict. c. 11.

(*r*) See 2 & 3 Vict. c. 11, s. 7, cited in Daniell, 364.

Mode of identifying documents, and Court may order production.

XVIII. And be it enacted, that any documents referred to in a special case, and any copies thereof, or extracts therefrom, identified by the signature of the solicitors for all parties, or of the London agents of such solicitors, may be produced and read at the hearing of such case, without further proof; and that it shall be lawful for the said Court, at any time after the filing of the special case, and the entering of appearances thereto by the persons named as defendants therein, to order any document which may be admitted thereby to be in the possession of any party to such case to be deposited and produced in such manner and for such purposes as the Court shall think fit (*s*).

Production of documents.

(*s*) See *supra*, sect. 8. As to ordering production of documents, see notes to sect. 18 of the Chancery Improvement Act, 1852, p. 175, *post*.

Court, on application of executors or administrators, may by order of course direct it to be referred to a Master to take an account of debts and liabilities.

XIX. And whereas it is expedient to provide means for enabling executors or administrators of deceased persons to ascertain whether there are any outstanding debts or liabilities affecting the personal estates of such persons without the delay and expense of suits to administer such estates (*t*): Be it therefore enacted, that it shall be lawful for the said Court, upon the application of the executors or administrators of any deceased person, by order to be made upon motion or petition of course (*u*), and to be in the form or to the effect set forth in the schedule hereto,

13 & 14 Vict. c. 35, s. 19.

with such variations as circumstances may require, to *refer it to one of the Masters* of the said court to take an account of the debts and liabilities affecting the personal estate of such deceased person, and to report thereon (*v*): Provided always, that no such order shall be made until *the expiration of one year* (*w*) next after the death of such deceased person, or pending any proceedings to administer the estate of such person, and that in case at any time after the making of such order any decree or order for administering the estate of such deceased person shall be made, it shall be lawful for the said Court by such decree or order to stay or suspend the proceedings under such order of course, on such terms and conditions if any, as to the said Court shall seem just.

Statutory remedies for and against executors and administrators.

(*t*) This and the following sects. (as extended by 23 & 24 Vict. c. 38, s. 14, *post*), enable an executor to *initiate* proceedings (respecting *personal estate* only, *Re Moore*, 2 W. R. 85), which he cannot do under 15 & 16 Vict. c. 86, ss. 45, 46; but see 22 & 23 Vict. c. 35, ss. 27—32, and 23 & 24 Vict. c. 38, s. 3, *post*, under which an executor or administrator can get complete protection, *Clegg* v. *Rowland*, 3. L. R. Eq. 368. And as to administration suits *by* executors, see 15 & 16 Vict. c. 86, s. 42, r. 6, *post*, p. 195. And *against* executors, see *ibid*, rr. 1, 2, 3; and see Williams on Executors, 1768, 1852.

Application by summons.

(*u*) This application may now be made by summons in chambers, 23 & 24 Vict. c. 38, s. 14. And it is generally made either by summons or by motion, and not by petition of course, see Daniell, 1096; and for the mode of prosecuting the order and issuing advertisements, see schedule, *post*, p. 134; and Ord. XXXV. 35—52; and Ord. 27 May, 1865.

(*v*) The form, since the 15 & 16 Vict. c. 80, is not "that it be referred to the Master," &c., but "that an account be taken," &c. (*Re Catling*, 9 Hare, App. vii., and see Seton, 147).

(*w*) By the 14th section of the 23 & 24 Vict. c. 38, it is provided that the order may be obtained immediately after probate or letters of administration have been granted.

Master's report may be objected to by motion to the Court, of which notice shall be given.

XX. (*x*). And be it enacted, that it shall be lawful for any person who may have come in before the *Master* under any such order, and claimed to be a creditor upon the estate of the deceased person, or to have any demand upon such estate by reason of any liability, and whose debt or claim may not have been wholly allowed by the said *Master* (*x*), to apply to the said *Court by motion*, of which notice shall be given within *fourteen days* after the filing of the *Master's* report, to have such claim allowed by the Court, either wholly or partially; and it shall be lawful for the said executors or administrators, and for

any creditor of the deceased person who may be authorised by special leave of the said Court so to do, to apply to the said *Court by motion*, of which notice shall be given within the time aforesaid, to have any debt or claim allowed by the said *Master* disallowed by the Court, either wholly or partially; and at the expiration of *fourteen days* after the filing of the said report the same shall, except as to any debt or claim as to which any such notice as aforesaid may have been given, be absolute, as if the same had been confirmed by order of the Court (*x*). 13 & 14 Vict. c. 35, s. 20.

(*x*) For the present mode of taking the judge's opinion on any point in the chief clerk's certificate by motion or summons, see sect. 33 of the Master in Chancery Abolition Act, *post*, p. 153. And the time now is *four*, not fourteen days. See note to that section. 15 & 16 Vict. c. 80, s. 33.

XXI. And be it enacted, that upon the hearing of any such motion as aforesaid the said Court may either dismiss such motion, or may order the debt or claim to which such motion relates to be allowed or disallowed, as the case may be, and either wholly or partially, or may direct further inquiry or further proceedings, *by way of action* (*y*) or otherwise, touching such debt or claim; and after such inquiry or proceedings may, upon further motion, deal with such debt or claim as to the said Court shall seem just: Provided always, that no new evidence shall be received by the said Court upon the hearing of any such motion without special leave of the said Court. Proceeding of the Court on such motion.

(*y*) See now Sir John Rolt's Act, *post*, and *Re Hooper*, 11 W. R. 130, where under that Act the Court adjudicated on the legal claim of a creditor who had come in under an administration suit. 25 & 26 Vict. c. 42.

XXII. And be it enacted, that in case any debt or any certain liability shall have been allowed as aforesaid, and shall not within fourteen days after the report has become absolute as to such debt or liability, or after the same shall have been allowed by the said Court, be paid or provided for by appropriation to the satisfaction of the person who has established such liability, it shall be lawful for the said Court, by order, to be made in case of any debt remaining due, upon the application by motion If debts or certain liabilities allowed, and not paid or provided for, order may be made for payment or accounts.

13 & 14 Vict. c. 35, s. 22.

or petition of the person to whom the debt remains due, and on notice to the executors or administrators, and in case of any certain liability remaining unprovided for by appropriation, upon the application by motion or petition of the person by whom such liability has been established, or of the executors or administrators, and on notice by the party applying to the other of them, to order payment of the debts which may have been allowed and remain unpaid, and to provide for the certain liabilities which may have been allowed and remain unprovided for, in like manner as the same could or might have been paid or provided for in a suit for that purpose instituted by bill, or to refer it to the Master, to take an account of the debts and certain liabilities allowed as aforesaid which remain unpaid or unprovided for, and also the usual accounts of the personal estate of the deceased person, with all usual and proper directions; and every such order shall have the same force and effect and shall be prosecuted and carried on in like manner as a decree in a creditor's suit instituted by bill (*z*).

Decree for accounts.

(*z*) As to ordering accounts, see Ord. XXXV. 15, 16, 33, 34; and for form of order, Seton, 1232; and as to executors or administrators accounting, see Daniell, 1139.

Court, on application of executors or administrators, may direct appropriation of money to answer contingent liability.

XXIII. And be it enacted, that in case any contingent liability shall be allowed by the said report or by the said Court, it shall be lawful for the said Court, by order, to be made upon the application of the executors or administrators, by motion or petition, on notice to the person who may have established such contingent liability, to order such sum of money, part of the estate of the deceased person, as to the said Court shall seem just, to be set apart and appropriated for answering such contingent liability (*a*), and to give such directions as the said Court shall think fit touching the payment of such sum of money into Court, and the investment thereof, and the payment, application, or accumulation of the interest or dividends thereof in the meantime and until the same shall be required to answer such liability, and when such liability shall be ascertained or determined to

give such directions as to the payment of such sums out of court as the said Court shall deem right: Provided always, that no order to be made as aforesaid shall in any manner bind the assets so appropriated as against the persons entitled to the estate of the deceased subject to the contingent liability; and any person interested in such appropriated assets may apply to the Court touching the same as he may be advised. 13 & 14 Vict. c. 35, s. 23.

(*a*) A sum was, on motion by the executor, set apart to provide for an unascertained debt mentioned in the Master's report, the creditor not having appeared or established the liability before the Master, but having been served with notice of and appearing on the motion (*Re Howkins*, 10 Hare, App. xxxiii.). See now as to protection to executors, note (*t*), *supra*, p. 126. Unascertained debt.

XXIV. And be it enacted, that after the filing of such report as aforesaid, it shall be lawful for the said Court, upon the application of the executors or administrators of the deceased, by order, to be made *on motion* (*b*), to restrain by injunction any proceedings at law against them by any person having or claiming to have any demand upon the estate of the deceased by reason of any debt or liability, other than the persons who may have established contingent liabilities under the said order for which no appropriation may have been made. Court may restrain proceedings against executors and administrators.

(*b*) Or summons, see 23 & 24 Vict. c. 38, s. 14, where this section is repeated.

XXV. (*c*) And be it enacted, that in case no debt or liability, or no debt or liability other than a contingent liability, shall have been allowed as aforesaid, or in case any debt or liability, other than as aforesaid, shall have been allowed as aforesaid, then, after the same shall have been paid or provided for by appropriation as aforesaid, all payments made by the executors or administrators, or any of them, on account of the estate of the deceased person, and all dispositions of such assets made by them or any of them, on account of such estate, shall, as against all persons having or claiming to have any demand upon such estate by reason of any debt or liability, other than persons who may have established under the said order any contingent liability for which no such appropriation as Protection to be afforded to executors or administrators.

13 & 14 Vict. c. 35, s. 25.

aforesaid may have been made, be as good and effectual as if the same had been made under a decree of the said Court: Provided always, that nothing herein contained shall in any manner affect or prejudice the rights of any creditor or other person having any demand or claim upon the estate of the deceased against any assets so paid or disposed of, or against the persons to whom such payment or disposition may have been made, or against any assets appropriated under the provisions of this Act, and the appropriation of which, if made under a decree of the said Court in a suit to which he was not a party, would not have been binding upon him.

(*c*) See now as to the protection of executors, note (*t*), *supra*, p. 126.

[Sect. 26.] [Section 26 provided that any of the judges of the Court of Chancery might hear applications as to the conduct of suits in the first instance, if under special circumstances he should think fit to do so. Such applications are now made in chambers, see sect. 26 of the Master in Chancery Abolition Act, *post*, p. 145].

Exceptions for scandal, impertinence, and insufficiency to be heard by the Court.

XXVII. And be it enacted, that all exceptions for scandal, impertinence (*d*), and insufficiency, which, according to the existing practice of the said Court, are referred to the Masters of the said Court, shall not any longer be so referred, but shall be heard and determined by the said Court in the first instance (*d*).

(*d*) Exceptions for impertinence are now abolished (15 & 16 Vict. c. 86, s. 17). Any party to the cause may file exceptions for scandal. See as to setting them down for hearing, Ord. XVI. 10.

Power for Court, notwithstanding any rule, &c., to the contrary, to receive proof by affidavit.

XXVIII. And be it enacted, that, notwithstanding any rule or practice of the said Court to the contrary, it shall be lawful for the said Court, at the hearing of any cause or of any further directions therein, to receive proof by affidavit of all proper parties being before the Court, and of all such matters as are necessary to be proved for enabling the said Court to order payment of any monies belonging to any married woman, and of all such other matters not directly in issue in the cause (*e*) as in the opinion of the said Court may safely and properly be so proved.

Affidavits when admitted under this section.

(*e*) Affidavits were admitted at the hearing under this section as evidence that no appointment of trust funds had been made by deceased persons, in

support of a suit by a party claiming in default of appointment (*Devey* v. *Thornton*, 9 Hare, 222, 233 ; and see *Smith* v. *Leathart*, 20 L. J. Ch. 202). 13 & 14 Vict. c. 35, s. 28.

So, where a class of children was interested, the Court, instead of directing the preliminary class inquiry, received the affidavits of the parents proving the class, and then allowed the cause to be heard (*Bush* v. *Watkins*, 14 Beav. 33; cf. *Bear* v. *Smith*, 5 De G. & S. 92 : *Fowler* v. *Reynell*, 15 Jur. 1019). As to what exhibits and documents can be proved at the hearing under this section, see Daniell, 816, and note (*c*). Matters raising a new issue not noticed in the pleadings cannot be proved under this section ; thus, where the pleadings in the cause raised the issue as to what fund a legacy should be charged on, and at the hearing on further consideration an affidavit was tendered to prove that the legacy had been paid, it was held that as the affidavit related to an issue not raised by the pleadings it was inadmissible under this section, but a further inquiry was directed (*Howard* v. *Chaffers*, 11 W. R. 585 ; see *Hoghton* v. *Hoghton*, 15 Beav. 278). So an affidavit as to the conduct of the plaintiffs cannot be received at the hearing after the Master's report has been made (*Bateman* v. *Margerison*, 2 W. R. 607 ; *Evans* v. *Lewis*, 2 L. T. N. S. 559 ; where *Fallows* v. *Lord Dillon*, 2 W. R. 507, was not followed ; and see Daniell, 1249. Affidavits admitted at hearing.

As to the larger powers of proving facts and documents at the hearing in causes where issue is joined, see note to Ord. 5 Feb. 1861, r. 7, *post*. Where issue is joined.

XXIX. And be it enacted, that * * * * it shall be lawful for the Master of the Rolls and the Vice-Chancellors respectively to discharge, reverse, or alter any order made on motion or petition of course by any other of them, or by the Lord Chancellor (*f*). Orders of course. One judge may reverse an order of course made by another judge.

(*f*) The omitted portion of this section repeals at length certain provisions of 53 Geo. 3, c. 24, and 5 Vict. c. 5.

XXX. And be it enacted, that it shall be lawful for the Lord Chancellor, with the advice and consent of the Master of the Rolls and any one or more of the Vice-Chancellors, from time to time to make, rescind, and alter general rules and orders for better enabling the opinion of the said Court to be obtained on special cases, and for effectuating the purposes of this Act as to the debts and liabilities of deceased persons, and for making any provisions which may be or be deemed necessary or proper as to amendment, revivor, and supplemental matter or relief, and as to costs of any proceedings under or in pursuance of this Act, and for regulating the times and form and mode of procedure, and generally the practice of the said Court in respect of the matters to which this Act relates, and every of them, and so far as may be found expedient for altering the course of proceeding hereinbefore prescribed in respect to such matters or any of them (*g*). Power to Lord Chancellor, &c. to make general rules and orders from time to time.

13 & 14 Vict. c. 35, s. 30.

(g) See Ord. XXXV., and Order, 27 May, 1865, for rules as to advertisements by executors.
No general order has been made as to special cases.

Rules and orders to be laid before Parliament, and to be binding from the time appointed or from the making, unless objected to by vote of either House of Parliament.

XXXI. And be it enacted, that all such general rules and orders shall be laid before both Houses of Parliament, if Parliament shall be then sitting, immediately upon the making and issuing the same, or, if Parliament shall not be then sitting, then within five days after the next meeting thereof; and that every such rule or order shall from and after the time in that behalf to be appointed by the Lord Chancellor, with such advice and consent as aforesaid, and if no time shall be so appointed, then from and after the making thereof, be binding and obligatory on the said Court, and be of like force and effect as if the provisions therein contained had been expressly enacted by Parliament: Provided always, that if either of the Houses of Parliament shall, by any resolution passed at any time before such House of Parliament shall have actually sat thirty-six days after such rules, orders, and regulations shall have been laid before such House of Parliament, resolve that the whole or any part of such rules or orders ought not to continue in force, in such case the whole or such part thereof as shall be so included in such resolution shall from and after such resolution cease to be binding and obligatory on the said Court: Provided also, that no such rule or order as aforesaid shall by virtue of this Act be of the like force and effect as if the provisions therein contained had been expressly enacted by Parliament, unless the same shall be expressed to be made in pursuance of this Act; and that every such rule or order so expressed to be made in pursuance of this Act which shall not be laid before both Houses of Parliament within the time by this Act limited for that purpose, shall from and after the expiration of such time be absolutely void and of no effect.

Rules and orders not laid before Parliament within time limited to be void.

Until rules or orders are made, and if not applicable when made, practice to be

XXXII. And be it enacted, that in the meantime and until any such general rules or orders shall be made, and in so far as the same, when made, shall not be applicable, the proceedings under this Act shall be governed and re-

gulated by the provisions herein contained so far as the same extend, and in so far as the same do not extend shall, as well with respect to the persons who ought to be made parties to special cases as in every other respect, be governed and regulated by the rules, orders, and practice of the said Court in suits instituted by bill, so far as the same can be applied thereto; and, subject to such general rules and orders as aforesaid, the costs (*h*) of all proceedings under this Act shall be in the discretion of the said Court.

13 & 14 Vict. c. 35, s. 32.

according to this Act and practice of the Court.

(*h*) In *Jackson* v. *Craig*, 15 Jur. 811, V.-C. Knight Bruce thought that the Court had power to direct the costs of a special case to be paid out of the testator's estate (and see *Smith* v. *Stuart*, 20 L. J. Ch. 205; *Burt* v. *Sturt*, 1 W. R. 145; *Evans* v. *Evans*, 22 L. T. 43). But in *Blinston* v. *Warburton*, 2 K. & J. 406, it was said by V.-C. Wood, that *where there was no fund in court* the Court had no such jurisdiction, and that in such a case there should either be some arrangement between the parties or a question in the case out of what fund they should be paid. The latter course is more generally adopted in practice; but see *Usticke* v. *Peters*, 4 K. & J. 437.

Costs of special case.

As a general rule, the Court, in awarding the costs of a special case, is governed by the rules which regulate it in ordering payment of the costs of a suit instituted by bill. Thus, if the difficulty arise out of a testator's will, the costs, as in an administration suit, will be ordered to be borne by the testator's general estate (*Cookson* v. *Bingham*, 17 Beav. 262; *Hindle* v. *Taylor*, 5 D. M. G. 585; but see *Lloyd* v. *Cocker*, 27 Beav. 649); or residuary real estate (*Marshall* v. *Grime*, 28 Beav. 379); or, if there be no general estate, by the fund specifically bequeathed, *Cookson* v. *Bingham*, l. c.; but see also, *Lloyd* v. *Cocker*, l. c.; and *Usticke* v. *Peters*, l. c., where V.-C. Wood held that the costs of a special case were not to be decided on the same principle as those of an administration suit, and that a plaintiff succeeding upon a special case arising out of the construction of a will was entitled to his costs from the defendant. So in *Mortimore* v. *Mortimore*, 4 De G. & J. 472, a special case having been stated for the opinion of the Court, at the instance of a tenant for life, with a view to obtaining an increase of her income by an investment, of which the Court in its judgment expressed disapprobation, the income of the tenant for life was ordered to bear the costs. Again, in *Sabin* v. *Heape*, 27 Beav. 561, where the question was whether the plaintiffs could make a good title, the costs of a special case were in answer to a question in the case, declared to be payable by the defendant, upon the principle that, if a bill had been filed for specific performance, a decree would have been made against him with costs.

By whom payable.

Compare note (*k*), p. 67, as to costs under the Trustee Relief Act.

XXXIII. And be it enacted, that all decrees and orders made under the provisions of this Act shall be subject to rehearing, appeal, and review, and may be discharged and varied, in the same and the like manner as decrees and orders of the said Court made in suits instituted by bill (*i*).

Decrees and orders to be subject to appeal, &c.

(*i*) As to suspending the decree in the meanwhile, see sect. 16, *ante*, p. 124.

13 & 14 Vict. c. 35, s. 34.

Interpretation of terms.

XXXIV. And be it enacted, that the following words and expressions in this Act shall have the several meanings hereby assigned to them, unless there be something either in the subject or in the context repugnant to such construction:

Words importing the singular number only shall include the plural number, and words importing the plural number only shall include the singular number:

Words importing the masculine gender only shall include females:

The expression "Lord Chancellor" shall mean and include the Lord Chancellor, Lord Keeper, and Lords Commissioners of the Great Seal of the United Kingdom for the time being:

The word "Master" shall mean Master in Ordinary of the High Court of Chancery in England:

The word "lunatics" shall include idiots and persons of unsound mind, and whether found such by inquisition or not:

The word "guardian" shall mean father or testamentary guardian, or guardian appointed by the Court of Chancery (not being a special guardian appointed under the provisions of this Act).

Commencement of Act.

XXXV. And be it enacted, that this Act shall commence and take effect from and after the first day of November one thousand eight hundred and fifty.

SCHEDULE referred to by the foregoing Act.

[*Date.*]

In the matter of *A. B.* late of in the County of [Banker, *or as the case may be*], deceased.

Upon motion this day made unto this Court by Mr. of counsel for *C. D.* of the executor [*or* administrator] of the above-named *A. B.* [*or* upon the

humble petition (*k*) of *C. D.* of the executor (*or* administrator) of the said *A. B.*, this day preferred unto the Right Honourable the Master of the Rolls for the reasons therein contained], it is ordered, that it be referred to the Master of this Court in rotation to take an account of the debts and liabilities affecting the personal estate of the said *A. B.*, and to compute interest on such of the said debts and liabilities as carry interest after the rate of interest the same respectively carry; and the said Master is to cause an advertisement to be published in the London Gazette and such other public papers as he shall think fit for the persons claiming in respect of any such debts or liabilities to come in before the said Master, and to prove their debts and claims, and he is to fix a peremptory day for that purpose; and such of the said creditors as shall not come in and prove their debts and claims by the time so to be limited are to be excluded the benefit of this order: And it is ordered, that the said Master do distinguish debts from liabilities, and liabilities certain from liabilities contingent: And it is ordered that the personal estate of the said *A. B.* be applied in payment and satisfaction of such debts and liabilities of the said *A. B.* in a due course of administration; and for the better taking the said accounts and discovery of the matters aforesaid the parties are to produce before the said Master, upon oath, all deeds, books, papers, and writings, in their custody or power relating thereto, and are to be examined upon interrogatories as the said Master shall direct; and any of the parties are to be at liberty to apply to the Court as there shall be occasion.

(*k*) See note (*o*), to sect. 19, and cases there cited.

TRUSTEE ACT, 1850.

13 & 14 VICT. CAP. 60.

[See *ante*, p. 76.]

COURT OF APPEAL IN CHANCERY ACT (*a*).

14 & 15 VICT. CAP. 83.

An Act to improve the Administration of Justice in the Court of Chancery and in the Judicial Committee of the Privy Council. [*7th August*, 1851.

14 & 15 Vict. c. 83.

WHEREAS it is expedient that further provision should be made for the administration of justice in the High Court of Chancery and in the Judicial Committee of the Privy Council: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Appeal Court of Duchy of Lancaster.

(*a*) The Court of Appeal of the Palatine Court of the Duchy of Lancaster consists of the Chancellor of the duchy and the two Lords Justices of the Court of Appeal in Chancery; see 17 & 18 Vict. c. 82; Seton, 1159; *Ex parte Williams*, 34 Beav. 370.

[Sects. 1 & 2 give power to Her Majesty to appoint two persons to be judges of the Court of Appeal in Chancery.]

Precedence of judges of Court of Appeal.

III. The said judges shall be styled Lords Justices of the Court of Appeal in Chancery, and shall have rank and precedence next after the Lord Chief Baron of the Court of Exchequer, and as between themselves shall have rank and precedence according to the order and time of their appointment.

Judges of Court of Appeal to take the following oath.

IV. Every judge so appointed shall, previous to his executing any of the duties of his office, take the following oath, which the Lord Chancellor or the Master of the Rolls for the time being is hereby respectively authorised and required to administer:

"I do solemnly and sincerely promise and swear, that I will duly and faithfully, and to the best of my skill and power, execute the office of Lord Justice of the Court of Appeal in Chancery.

"So help me GOD."

Court of Appeal to have the jurisdiction

V. From and after the first day of October one thousand eight hundred and fifty-one, all the jurisdiction of

the High Court of Chancery in England which is now possessed and exercised by the Lord Chancellor in the said Court of Chancery, and all powers, authorities, and duties, as well ministerial as judicial, incident to such jurisdiction, now exercised and performed by the Lord Chancellor, shall and may be had, exercised, and performed by the said Court of Appeal (*b*).

14 & 15 Vict. c. 83, s. 5.

now exercised by the Lord Chancellor.

(*b*) The Court of Appeal appointed by this Act have jurisdiction to correct an error in an order made by the Lord Chancellor (*The Attorney-General* v. *The Corporation of Exeter*, 22 L. J. Ch. 418).

Powers of Appeal Court.

When the judges differ, the decree below is affirmed, sect. 9.

The Lord Chancellor will sit with the Lords Justices if necessary (vid. *Sheffield* v. *Lord Coventry*, 1 W. R. 58). But when, after fully hearing a case, the Lords Justices differ, and the decree below is affirmed, a rehearing before the full Court will not in general be directed (*Blann* v. *Bell*, 2 D. M. G. 775).

Sittings of Appeal Court.

VI. Where under any Act of Parliament any jurisdiction is vested in the Lord Chancellor, or any power, authority, or duty is to be exercised or performed by the Lord Chancellor, and under the directions of any Act or by the usage in this behalf such power, authority, or duty is or ought to be exercised or performed by the Lord Chancellor acting judicially in the said Court of Chancery, all such jurisdiction, power, authority, and duty, and the ministerial powers and authorities incident thereto or consequent thereupon, which are now exercised and performed by the Lord Chancellor, shall, from and after the said first day of October one thousand eight hundred and fifty-one, be had, exercised, and performed by the said Court of Appeal.

Statutory jurisdiction now exercised by the Lord Chancellor as a judge in Chancery may be exercised by the Court of Appeal.

VII. From and after the first day of October one thousand eight hundred and fifty-one, all the powers, authorities, and jurisdiction, original and appellate, given and granted to the Vice-Chancellors of the said Court of Chancery, or any of them, under the Bankrupt Law Consolidation Act made and passed in one thousand eight hundred and forty-nine (*c*), or otherwise had, possessed, or exercised by the said Vice-Chancellors, or any of them, in matters of bankruptcy, shall be granted to, vested in, exercised and possessed by the said Court of Appeal; and all the provisions of the said Act in relation to such appeals to such Vice-Chancellor shall be construed accord-

Jurisdiction of Vice-Chancellor in bankruptcy transferred to the Court of Appeal.

14 & 15 Vict. c. 83, s. 7.

ingly: Provided always, that there shall not be any appeal from the decision of the said Court of Appeal to the Lord Chancellor, anything in the said Bankrupt Law Consolidation Act to the contrary notwithstanding.

(*c*) 12 & 13 Vict. c. 106, s. 13. As to appeals in Bankruptcy to the House of Lords, see s. 10, *infra*.

Common Law judges may sit on request of Lord Chancellor.

VIII. It shall be lawful to the said Court of Appeal and the Master of the Rolls, and the Vice-Chancellors, and for each of the said jurisdictions, to sit, with the assistance of any judge of either of Her Majesty's Courts of Common Law at Westminster, upon the request of the Lord Chancellor, if any such Common Law judge shall find it convenient to attend upon such request (*d*).

Assistance of Common Law judge.

(*d*) The Court now generally tries questions of law or fact itself, see 25 & 26 Vict. c. 42, s. 1, and note. The assistance of a Common Law judge under this section, will only be called in when the case is one of difficulty (*Heward* v. *Wheatley*, 3 D. M. G. 628); cf. *Falkner* v. *Grace*, 9 Hare, 283, where it was said by V.-C. Turner, that the power given by the section ought not to be resorted to on a question turning merely on the construction of particular instruments, and not involving points of public importance. When a case is reheard before the Court and a Common Law judge, it has been said to be usual to hear only one counsel on each side (*Norman* v. *Mitchell*, 2 W. R. 685; *Jones* v. *Beach*, 2 D. M. G. 886. But this rule is not invariable). The application to the Common Law judge to sit must be made through the Lord Chancellor (*Hay* v. *Willoughby*, 9 Hare, App. xxx.; *Deerhurst* v. *Jones*, 16 Jur. 988). But where the Court of Appeal, on an interlocutory motion, suggests that the cause is a proper one to be heard before the Vice-Chancellor with the assistance of a Common Law judge, the Vice-Chancellor will make an order to that effect on motion (*Hughes* v. *Chester and Holyhead Railway Company*, 8 W. R. 337).

How obtained.

Decision of majority to be binding; if Court equally divided the decree, &c., appealed from to be affirmed.

IX. The decision of the majority of the judges of the Court of Appeal shall be taken and deemed to be the decision of the said Court; and if the judges of the said Court be equally divided in opinion on any cause or matter brought before the Court by way of appeal, the decree or order appealed from shall be taken and deemed to be affirmed by the Court of Appeal (*e*).

(*e*) In such a case, unless it be otherwise directed, the costs of the appeal will follow the result (*Re Clarke*, 1 D. M. G. 43).

Decrees, &c., of the said Court of Appeal may be appealed from to the House of Lords.

X. All decisions, decrees, or orders of the Court of Appeal, *including decisions in matters of bankruptcy*, shall be subject to appeal to the House of Lords (*f*) in the cases and under the conditions in and under which the like decisions, decrees, or orders of the Lord Chancellor

would have been subject to such appeal if this Act had not been passed; but the appeal to the House of Lords in *matters of bankruptcy* shall be only on matters of law or equity, or on the rejection or admission of evidence, and on a special case to be approved and certified by one of the judges of the Court of Appeal hereby constituted, whose determination on the settlement of such case shall be final and conclusive (*g*). 14 & 15 Vict. c. 83, s. 10.

(*f*) As to the practice where on the hearing of an appeal in the House of Lords it appears that all parties are not properly represented, see *Trevillian* v. *Knight*, 1 L. R. H. L. 30. Appeal in House of Lords.

As to the mode of enforcing the order of the House of Lords when that House is not sitting, by making such order an order of the Court of Chancery, see *Wentworth* v. *Lloyd*, 13 W. R. 146. Order how enforced.

(*g*) The Bankruptcy Act, 1861, made no difference in this discretionary power of the L.JJ. to allow appeals in bankruptcy, *Re Newton*, 10 W. R. 547. Appeals in bankruptcy.

XI. All the jurisdiction, powers, and authorities of the said Court of Appeal may be exercised either by one only of the judges for the time being appointed under this Act and the Lord Chancellor sitting together as such Court of Appeal, or by both of the judges so appointed sitting as such Court apart from the Lord Chancellor, either in his absence from the said Court of Chancery, or during the same time as he is sitting in such court: Provided always, that the Lord Chancellor shall and may also, while sitting alone or apart from such two judges, have and exercise the like jurisdiction, powers, and authorities, as well as all such other jurisdiction, powers, and authorities as might have been exercised by the Lord Chancellor if this Act had not been passed. One judge appointed under this Act sitting with the Lord Chancellor, or both judges sitting apart from him, to form the Court of Appeal. Lord Chancellor sitting alone to have co-ordinate jurisdiction with the Court of Appeal.

XII. The Lord Chancellor shall fix the times at which the two judges of the said Court of Appeal appointed under this Act, or either of them, shall sit with the Lord Chancellor, and at which such two judges shall sit apart from him as such Court of Appeal, and also what appeals and matters now usually heard and determined by the Lord Chancellor, and hereby made subject to the jurisdiction of the said Court of Appeal, shall be heard and determined by such Court when the Lord Chancellor is sitting with the said judges to be appointed under this Act, or one of them, and by such judges when sitting Lord Chancellor to regulate sittings and business of Court of Appeal.

14 & 15 Vict. c. 83, s. 12.

apart from such Lord Chancellor, and by such Lord Chancellor when sitting alone, respectively and generally may make such regulations as to him may seem proper for dividing and regulating the business of the said Court of Appeal, and for the attendance of a registrar of the said Court of Chancery at the sittings of the said Court of Appeal (*h*).

Appeals how marked for hearing.

(*h*) Appeals are usually marked for hearing before the Lords Justices. As to applications to transfer appeals under this section, see *Williams* v. *Glenton*, 14 W. R. 89.

Saving of ministerial and certain other powers of the Lord Chancellor.

XIII. Nothing herein contained shall affect any of the powers, duties, or authorities attached to the office of Lord Chancellor, or exercised by the Lord Chancellor as keeper of the Great Seal, except the powers, authorities, and duties which are exercised and performed by him acting as a judge in the said Court of Chancery, either by virtue of his ordinary jurisdiction or of any statute and the ministerial powers and authorities incident thereto respectively, or affect the powers, authorities, and duties of the Lord Chancellor, under and by virtue of any appointment under the sign manual of the Crown, as having the custody of the persons and estates of persons found idiotic, lunatic, or of unsound mind (*i*), or in relation to letters patent, grants, or writings passed or to be passed, under the Great Seal of the United Kingdom, or the revocation of such letters patent, grants, or writings, or the powers and authorities of the Lord Chancellor in right or on behalf of her Majesty as visitor of any charity or other foundation, or the powers of the Lord Chancellor of appointment to or removal from or otherwise in relation to offices in the Court of Chancery, or other offices, save as herein specially provided, or the powers of the Lord Chancellor to direct and regulate the sittings and duties of the Vice-Chancellors, or any powers of the Lord Chancellor (whether to be exercised by the Lord Chancellor alone, or with the concurrence or advice or consent of the Master of the Rolls, or by the Master of the Rolls and the Vice-Chancellors, or otherwise), to make rules or orders for regulating the practice, proceedings,

and business of the Court of Chancery, or the business or duties of any of the offices or officers of such court; and in all cases where the concurrence, advice, or consent of the Master of the Rolls and of one of the Vice-Chancellors, or of either of them, shall be requisite for the making of such rules or orders, the concurrence, advice, or consent of one of the judges appointed by virtue of this Act may be substituted for that of the Master of the Rolls or of such Vice-Chancellor. 14 & 15 Vict. c. 83, s. 13.

(*i*) See note (*q*) to p. 81, *ante*, as to lunacy jurisdiction.

Lunacy jurisdiction.

One of the judges of the Court of Appeal may sit for Master of the Rolls or Vice-Chancellor during his temporary absence.

XIV. In case the Master of the Rolls or any Vice-Chancellor of the High Court of Chancery shall be prevented by illness or otherwise from sitting at any time when according to ordinary course his court would be open, the Lord Chancellor may, by writing under his hand, from time to time, so often as occasion may require, authorise one of the judges of the said Court of Appeal to sit for the hearing and determining of causes and matters in lieu of the Master of the Rolls or such Vice-Chancellor, and the judge sitting under such authority as aforesaid may, for the purpose of disposing of any cause or matter which has been partly heard by him, continue such his sittings, notwithstanding the Master of the Rolls or Vice-Chancellor in whose stead he has partly heard such cause or matter may also be sitting for the hearing of other causes or matters; and all decrees and orders made by such judge in pursuance of such authority shall be of the same effect and validity and subject to revision and appeal, in the same manner in all respects as if made by the Master of the Rolls or Vice-Chancellor, as the case may be: Provided always, that such judge shall not sit as a judge of the said Court of Appeal upon any appeal from any decree or order made by himself.

Judges of Court of Appeal if privy councillors to be of the Judicial Committee.

XV. Every person holding or who has held the office of a judge of the Court of Appeal in Chancery shall, if a member of her Majesty's Privy Council, be a member of the Judicial Committee of the Privy Council.

XVI. So much of the Act of the Session holden in the

14 & 15 Vict. c. 83, s. 16.

No matter to be heard, &c., by Judicial Committee unless three members are present, exclusive of Lord President.

third and fourth years of King William the Fourth, chapter forty-one, as provides that no matter shall be heard, nor shall any order, report, or recommendation be made, by the Judicial Committee of the Privy Council, in pursuance of that Act, unless in the presence of at least four members of the said committee, shall be repealed; and no matter shall be heard, nor shall any order, report, or recommendation be made, by the said Judicial Committee, in pursuance of the said Act or any other Act, unless in the presence of at least three members of the said committee, exclusive of the Lord President of her Majesty's Privy Council for the time being.

[The omitted sections relate to the payment of salaries to the judges and registrars, &c.]

Interpretation of term "Lord Chancellor."

XXIV. In the construction of this Act, unless such meaning be repugnant to or inconsistent with the context, the expression "Lord Chancellor" shall mean and include the Lord High Chancellor of Great Britain, and the Lord Keeper or Lords Commissioners of the Great Seal of the United Kingdom, for the time being.

TRUSTEE EXTENSION ACT.

15 & 16 VICT. CAP. 55.

[See *ante*, p. 111.]

MASTER IN CHANCERY ABOLITION ACT.

15 & 16 VICT. CAP. 80.

An Act to abolish the Office of Master in Ordinary of the High Court of Chancery, and to make provision for the more speedy and efficient Despatch of Business in the said Court. [30*th June*, 1852.

15 & 16 Vict. c. 80.

WHEREAS proceedings before the Masters in Ordinary of the High Court of Chancery are attended with great

delay and expense, and it is expedient that the business now disposed of in the office of such Masters should be transacted by and under the more immediate direction and control of the judges of the said Court: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: 15 & 16 Vict. c. 80.

I. The office of Master in Ordinary of the High Court of Chancery shall be and the same is hereby abolished, but reserving and subject to the execution by the present Masters in Ordinary of the said court, as such, of the duties hereinafter provided for; and until they are released under this Act they shall, for the performance of such duties, continue to have all the powers conferred upon them by any Act of Parliament, or otherwise vested in them. Office of Masters in Ordinary in Chancery abolished.

[The sections omitted relate to the retirement of the Masters and the payment of their pensions, and the winding up of proceedings before them. Closing of Masters' offices.

The Masters' offices were finally closed on Aug. 23, 1860.

The omitted sections also provided what proceedings should be taken in the event of parties neglecting or delaying to prosecute matters before the Masters, and see now, for the practice in case of such delay or neglect, Ord. XXXV. 23, and note.]

XI. From and after the first day of Michaelmas term one thousand eight hundred and fifty-two it shall be lawful for the Master of the Rolls and the Vice-Chancellors for the time being and they are hereby required to sit at chambers (*a*) for the despatch of such part of the business of the said court as can, without detriment to the public advantage arising from the discussion of questions in open court, be heard in chambers, according to the directions hereinafter in that behalf specified or referred to; and the times at and during which they respectively shall so sit shall be from time to time fixed by them respectively. Power to Master of the Rolls and Vice-Chancellors to sit at chambers for the despatch of business, &c.

(*a*) For the business to be disposed of at Chambers, see sect. 26, *infra*; and as to adjournments from court into chambers, see sect. 27. Cases of difficulty will be heard in Court, see sects. 27 and 29; and as to the right of parties to see the judge himself, see note (*b*), next page. The mode of proceeding in chambers is by summons, see sect. 28. Practice in chambers.

For the practice where parties do not proceed before the chief clerk with due diligence, see Ord. XXXV. 23, and note thereto.

15 & 16 Vict. c. 80, s. 11.

For the practice as to examination of witnesses in chambers, see sect. 30, and note, *infra*, p. 151.

For the form of the chief clerk's certificate, see sect. 32. Applications to vary the certificate may be made under sect. 34, and as to appeals from orders made by the judge in chambers, see note to sect. 28, p. 150.

Power to Lord Chancellor to provide Chambers for the Master of the Rolls and Vice-Chancellors.

XII. The Chamber business of the Master of the Rolls and of every Vice-Chancellor shall be carried on in conjunction with his court business: but as no rooms are attached to the courts of the Vice-Chancellors in which such chamber business can be transacted, it shall be lawful for the Lord Chancellor to cause chambers to be provided for every of them respectively for that purpose until courts with proper rooms attached can be provided for them.

Judges to have same power and jurisdiction as in open court.

XIII. The Master of the Rolls and every of the Vice-Chancellors respectively when sitting in chambers shall have the same power and jurisdiction in respect of the business to be brought before them, as if they were respectively sitting in open court (*b*).

Right of party to see judge himself.

(*b*) All orders made in chambers are made by the judge himself, and, consequently, the judge in chambers is always accessible to any of the parties engaged in proceedings there, who wish to see him, and it is the invariable practice to give any party, suggesting that he wishes to see the judge personally, the opportunity of doing so directly (*Hayward* v. *Hayward*, Kay, App xxxi.; *Re Rigg*, 10 W. R. 365); and the same rule applies to cases under the Winding-up Acts (*Re Agriculturist Cattle Insurance Company*, 3 D. F. J. 194; *Re Home Counties Life Assurance Company*, 10 W. R. 457. See *Saunders* v. *Walter*, 9 Hare, App. v., and *Re London and County Assurance Company*, 5 W. R. 794, where upon a motion to commit a party, who refused to answer a question, and requested that the case might be adjourned for hearing before the judge, it was held, that either party has a right on the minutest point to require an adjournment of the case before the judge himself in chambers, and the motion to commit was refused with costs. See *Williamson* v. *Jeffreys*, 9 Hare, App. lvi.; *Leeds* v. *Lewis*, 3 Jur. N. S. 1290, and see note (*o*), p. 152, *infra*, as to adjourning the examination of a witness to be taken before the judge in person.

The case being before the judge himself in chambers, no direction for liberty to state special circumstances is necessary in a decree or order (*Williamson* v. *Jeffreys*, l. c., and Seton, 98). As to cases where inquiries may be prosecuted in chambers, without an order directing them to be so prosecuted, see *Kelson* v. *Kelson*, 9 Hare, App. lxxxvi.

See 15 & 16 Vict. c. 86, s. 54, *post*, as to directions for taking accounts.

Orders made in chambers to be ordinarily drawn up by judges' clerks, but judges may direct them to be

XIV. The orders made by the Master of the Rolls and Vice-Chancellors respectively when sitting in chambers shall ordinarily be drawn up there by their respective clerks, to be appointed as hereinafter mentioned, but with power to each of such judges to direct any of such orders

to be drawn up by the registrar of the said court in like manner as orders made by a judge of the said court in open court are drawn up, for which purpose the registrars of the said court shall, when required, attend the Master of the Rolls and the Vice-Chancellors respectively when sitting at chambers, in such order and manner as shall be found most convenient for furthering the business of the said court, and as the Lord Chancellor, with the concurrence of the Master of the Rolls and Vice-Chancellors, or any two of them, shall from time to time by any general order direct.

15 & 16 Vict. c. 80, s. 14.

drawn up by registrars of the court, and may require their attendance at chambers for the purpose.

XV. All orders of the Master of the Rolls or of any Vice-Chancellor, made by him at chambers, shall have the force and effect of orders of the Court of Chancery, and such orders may be signed and enrolled in like manner (*d*).

Orders made at chambers to have same force as orders of Court, &c.

(*d*) As to appeals from orders made in chambers, see p. 150, *infra*.

Orders made in chambers may be enforced in the same manner as orders made in court, see p. 513, *post*, and as to four-day orders issued when the party disobeying an order was not present when it was made, see Daniell, 1089.

Enforcement of orders.

[Sections 16—25 related exclusively to the appointment and removal of the chief and junior clerks; respecting whom a new Act has been lately passed.

Chief and junior clerks.

Sect. 1 of the Court of Chancery (Officers) Act, 1867 (30 & 31 Vict. c. 87), gives the Lord Chancellor power to order additional chief clerks and junior clerks to be appointed, but the *total number* of *chief clerks* is not at any time to exceed *twelve*.

Court of Chancery (Officers) Act, 1867, 30 & 31 Vict. c. 87.

Sect. 7 permits the Lord Chancellor from time to time to transfer any clerk from any one judge to any other judge with the consent of the judges concerned.

Sect. 8 of the same Act gives the Lord Chancellor power to appoint additional *registrars* up to *thirteen*.

The same Act also confirms several appointments of chief clerks and junior clerks previously made.]

XXVI. The business to be disposed of by the Master of the Rolls and Vice-Chancellors respectively while sitting at chambers shall consist of such of the following matters as the judge shall from time to time think may be more conveniently disposed of in chambers than in open court (*e*), *videlicet*, applications for time to plead, answer, or demur; for leave to amend bills or claims; for enlarging publication; and also applications for the production of documents; applications relating to the conduct of suits or matters (*f*); applications as to the guardianship and maintenance of infants; matters connected with the management of property (*g*); and such other matters as

Business to be disposed of in chambers by the judges.

15 & 16 Vict. c. 80, s. 26.

each such judge may from time to time see fit, or as may from time to time be directed by any general order of the Lord Chancellor (*e*).

BUSINESS IN CHAMBERS.

(*e*) The following notices, Acts, and orders have been issued and passed with reference to the business to be transacted in chambers.

(A) Notice 10th Nov., 1852.

(A) By a notice issued in pursuance of the section in the text, affixed to the chambers of the Master of the Rolls and the Vice-Chancellors, on the 10th of November, 1852, it was provided that the following applications should be made in chambers (see 9 Hare, App. xlviii.).

INFANTS, guardians,

1. As to *guardianship of infants* (see Daniell, 1213, and as to the powers of guardians appointed by the Court, *ibid.* 1225), except the appointment of guardians *ad litem*, as to which see note (*f*), p. 401, *post*.

Guardians to act on behalf of infants under the Settled Estates Act, are also to be appointed on summons, see note (*u*), p. 252, *post*. For the evidence to be produced on application for guardians, see 19th Judges' Regul. Aug. 1857 (Appendix, p. lv. *post*); and see notes (*a*), p. 7, and (*h*), p. 9, *ante*.

2. For the appointment of a *guardian to concur in a special case* (but such applications are now made in court; note (*e*), p. 119, *ante*).

maintenance, &c.

3. As to the *maintenance* or advancement of infants; see for the necessary evidence, 19th Regul. Aug. 1857 (l. c.). The Order of 8 July, 1842, referred to in preliminary Ord. I. p. 362, *post*, provides for deduction of *income tax*, from money ordered to be advanced, unless the order specifies the contrary; see now as to trustees' statutory power to allow maintenance, sect. 26 of Lord Cranworth's Act, p. 302, *post*.

Marriage, &c., of *wards of court*.

So an application that a ward of Court, see note (*a*), p. 7, *ante*, may go out of the jurisdiction, or be allowed to marry, is made by summons (unless the application has to be made under the Infant Settlement Act, p. 234, *post*) See also head (5) next page.

Applications under Drainage Act.

4. Under the Drainage Act (8 & 9 Vict. c. 56); see *Waters* v. *Earl of Shaftesbury*, 2 L. R. Ch. 231; Daniell, 1871; Seton, 527. (The order 4 March, 1846, as to the practice under this Act, though not abrogated, is practically obsolete; see note (*b*), p. 362, *post*).

5. Under the *Trustee Acts of* 1850 *and* 1852 (see head (4) next page).

For administration by summons.

6. For the *administration of* estates under the Act of 15 *& 16 Vict. c.* 86; see note (*p*), p. 203, *post*, or under Sir G. Turner's Act, note (*u*), p. 126, *ante*.

7. Under the *Legacy Duty Act*, p. 65, *ante*, for payment of money out of Court (see head (2), next page, but compare sect. 5 of the County Courts Act, 1865, Appendix, p. xc. *post*).

8. For *time to plead, answer, or demur* (see Ord. XXXVII. 8, p. 569, *post*), and for time generally, see note (*s*), p. 572, *post:* but when the time originally given *has expired*, the application is by motion, p. 530, *post*, head (12).

For leave to amend.

9. For *leave to amend* bills (notes (*l*) and (*o*), pp. 411, 2, *post*), (or to file a supplemental answer).

For enlargement of time.

10. For *enlarging* publication, or the *time for closing evidence* (see note (*k*), p. 191, *post*).

For production of documents.

11. For the *production of documents* (see notes, p. 172, *post*).

12. Relating to the *conduct* of suits or matters (see note (*f*) *infra*).

13. As to matters connected with *management of property* (note (*g*) *infra*).

14. For payment into court of purchase-monies under *sales by order of the court*, and investing the same; see Ord. XXXV. 13, p. 548, *post*.

(B) 18 & 19 Vict. c. 134, s. 16, and Ord. XXXV. 1.

(B) 18 & 19 Vict. c. 134, s. 16 (p. 235, *post*), enacted (removing the doubt expressed in *Re Rye*, 1 Jur. N. S. 222,) that "whereas the Court of Chancery was empowered to make orders in respect of the disposition of trust funds and other matters under its control in a summary way upon petition or motion, but not upon application in chambers; the business to be disposed of in chambers should comprise such of the said matters as any general order should direct;" and accordingly it was directed by Ord. XXXV. 1, p. 544, *post*, that the business to be disposed of in chambers shall also comprise :—

Funds, &c., under control of Court.

(1.) Applications for *payment* to any person *of* the *dividends* or interest of any stocks, funds, or securities *standing to the credit of any cause* or matter depending, to the separate account of such person (see note (*b*), p. 544, *post*). 15 & 16 Vict. c. 80, s. 26. Payment out of dividends;

(2.) Applications under 36 Geo. 3, c. 52, s. 32 (*The Legacy Duty Act*, d. 65, *ante*), where the sum paid into the bank or the stock transferred into the name of the Accountant-General, does not exceed *three hundred pounds* cash, or stock, as the case may be (see head 7 last page). Orders under Legacy Duty Act;

(3.) Applications under the Trustee Relief Acts, *in all cases* where the trust fund does not exceed *three hundred pounds* cash, or stock. *or* Trustee Relief Acts;

(4.) Applications under the Trustee Acts, in all cases *where any decree or order shall have been made by the Court for the sale* or conveyance of any lands, manors, messuages, tenements, or hereditaments, corporeal or incorporeal, of any tenure or description, whatever may be the estate or interest therein (see note (*h*), p. 96, *ante*). Vesting orders under Trustee Acts;

N.B. Vesting orders in pursuance of ordinary petitions under the Act may be obtained by motion, p. 530, *post*, head (4).

(5.) Applications on behalf of *infants* under 1 Wm. 4, c. 65 (*Property Law Amendment Act*), ss. 12, 16, & 17, where the infant is a ward of the Court, or the administration of the estate of the infant or the maintenance of the infant is under the direction of the Court. under Property Amendment Act as to infants.

(C) To these must now be added—

(6.) Applications for special orders for taxation or reviewal of taxation, (Ord. 2nd Aug. 1864, p. 648, *post*, and see note (*l*), p. 593, *post*). See as to special orders for taxation, notes (*z*), p. 23, and (*e*), p. 24, *ante*. (C) Later Act and Orders. Taxation of costs.

(7.) Applications for new trustees of, and other relief relating to *charities*, see *Re Chamberlain's Charity Estates*, 1 W. R. 15, 32; *Re Caddick*, 9 Hare, App. ix.; *Re Hanson*, *ibid.* lv.; but see as to the Charity Commissioners jurisdiction, note (*o*), p. 98, *ante*, and Lewin, 406. As to charities.

(8.) Applications by mortgagors under the Mortgage Debenture Act, 1865, for discharge of their incumbrances by a company, and for a receiver in default of payment; (see Daniell, 1900.) Mortgage Debenture Act, 1865.

(9.) Applications to appoint an umpire in cases of arbitration under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 12. Arbitration.

(10.) Applications for transfer of suits *from a county court* to the High Court of Chancery, under sect. 3 of the Act of 1865 (Appendix, p. lxxxix. *post*), or from the High Court of Chancery to a county court, under sect. 8 of the Act of 1867 (Appendix, p. xcv. *post*). Transfer *from* or *to* a county court.

(D) Finally, sect. 11 (*supra*) of this Act provides for the dispatch in chambers of such part of the business of the court as can be there heard without detriment to the public advantage, and see sect. 27, *infra*, as to adjournment into chambers. (D) Prosecution of decrees and preliminary inquiries.

For cases in which *preliminary* inquiries are ordered, see notes on Ord. XX. p. 469, *post*, and for the procedure in chambers under decrees generally, see Ord. XXXV. p. 545, *post*, and Appendix, p. liii., *post*, and under decrees in specific performance, partnership, foreclosure, and other suits, Daniell, 1129, *et seqq.*

Under this head come also many kinds of *applications*, arising *in the course of proceedings under decrees and orders in chambers; e.g.*, to vary the chief clerk's certificate, note (*q*), p. 154, *post;* and for leave for persons, who have *not* been served with notice of the decree, to attend proceedings in chambers (the order for leave to attend, by persons who *have* been served with notice of decree is obtained on motion or petition of course (Seton, 46)); leave to bring in a claim after the time fixed by advertisement, and before the certificate is signed, see Ord. XXXV. 43, p. 558, *post*, or for directions as to accounts, &c., see note (*r*), p. 218, *post*, or for stop orders where assignor and assignee consent, p. 507, note (*a*), *post*. applications in the course of such prosecution, *e. g.*, to vary certificate, or for leave to attend proceedings, &c.

(*f*) Applications which may be made as to the conduct of a cause in chambers are such as the following:— AS TO CONDUCT OF CAUSES:

(1.) For directions in which of *two suits* proceedings shall be carried on, *Norvall* v. *Pascoe*, 10 W. R. 338; *Belcher* v. *Belcher*, 2 Dr. & Sm. where two suits;

15 & 16 Vict. c. 80, s. 26.

444; and see note (*a*), p. 393, *post*, as to the course where two suits for a similar object are instituted in *different branches of the court*.

where solicitor is changed;

(2.) For conduct of the suit on account of plaintiff's negligence, Ord. XXXV. 22, 23, and note (*y*), p. 553, *post*, or where a solicitor is changed, *Topping* v. *Searson*, 2 H. & M. 205; and see *Bullin* v. *Arnold*, 1 H. & M. 715, where one of several plaintiffs refused to concur in appointing a new solicitor; and see as to orders to change solicitors, Ord. III. 3, and notes, p. 386, *post*.

or not duly qualified.

(3.) To annul proceedings because the solicitor was not duly qualified, *Sparling* v. *Brereton*, 2 L. R. Eq. 64.

Security for costs.

(4.) That the plaintiff may give security for costs, *Tynte* v. *Hodge*, 2 J. & H. 692; and see note (*f*) to Ord. XL. 6, p. 578, *post*.

Conduct of next friend.

(5.) For inquiries as to conduct of next friend, *Piffard* v. *Beeby*, 1 L. R Eq. 948; and appointment of new next friend, Daniell, 81.

(6.) As to the manner of taking evidence under Ord. 5th Feb. 1861, rr. 3, 11, 19, 21, pp. 620—627, *post*, or for a special examiner, p. 186, *post*.

(7.) For leave to amend, &c., (see heads 8, 9, 10, p. 146), or to substitute service (see note (*b*), p. 419, *post*), or to enter appearance for absconding defendant (see note (*k*), p. 423, *post*).

Motions.

N.B. Applications which can be made by motion or petition *ex parte* and *of course*, must not be made in chambers, Seton, 48, see pp. 529, 530, *post*.

MANAGEMENT OF PROPERTY.

(*g*) The following applications connected with the management of property may be made at chambers:—

Receivers.

(1.) Respecting receivers of property, *when once appointed*, see note (*a*), pp. 499, *post*; for inspection of mines, &c., in the course of a suit.

Accounts, inquiries, sales, &c., *under decree*.

(2.) For sales under a decree (see Ord. XXXV. 13, *et seqq.* p. 548, *post*), *e.g.*, for sale by private contract; or for a sale before decree under sect. 55 of 15 & 16 Vict. c. 86, p. 219, *post*.

As to ordering a sale in a partition or other suit where *infants* are interested, see *Hubbard* v. *Hubbard*, 2 H. & M. 38; *Rickards* v. *Rickards*, 15 W. R. 380.

Allowance before decree.

(3.) For an allowance out of money in court under the 57th section of the 15 & 16 Vict. c. 86 (see note (*a*), p. 221, *post*).

For change of investments.

(4.) For change of investments under the 23 & 24 Vict. c. 38, s. 10 (p. 290, *post*) (*Ungless* v. *Tuff*, 9 W. R. 729).

Payment into court, and re-investments

(5.) For payment into court of purchase-money under decrees (head 14, p. 146), and for reinvestment in land of the purchase-money of lands belonging to *a charity*, which had been paid into court (see head 7, last page), or of monies paid into court under the Defence Act, 23 & 24 Vict. c. 112 (*Re Maynard's Trusts*, 9 W. R. 330).

Under Infants' Settlement and Settled Estates Acts.

(6.) For directions under the Infants' Settlement Act, or as to advertisements under the Settled Estates Act (20 & 23 Regul. as to business, Aug. 1857, Appendix, pp. lv., lvii. *post*).

Transfer of Land Act.

(7.) For registration or sale under the Transfer of Land Act, see 25 & 26 Vict. c. 53, s. 41, and note (*k*), p. 322, *post*.

Trustees' management.

(8.) For leave for trustees, made parties to a suit (see Daniell, 1156), to grant and renew leases (see *Bickford* v. *Chalker*, 21 L. T. 192); to do repairs, cut timber, drain, employ an agent or valuer, enfranchise copyholds, redeem land tax, concur in a sale of a mortgaged estate, (Seton, 45); to invest in land under a settlement or will (Seton, 492); to bring or defend actions (Daniell, 1156). A petition is not necessarily improper in such cases, *Turner* v. *Turner*, 30 Beav. 414.

Judges may adjourn from open court to chambers, and *vice versâ*, the consideration of any matter.

XXVII. It shall be lawful for the Master of the Rolls and every of the Vice-Chancellors respectively when sitting in open court to adjourn for consideration in chambers (*h*) any matter which, in the opinion of such judge, may be

more conveniently disposed of in chambers, or, when sitting in chambers, to direct any matter to be heard in open court which he may think ought to be so heard (*i*). 15 & 16 Vict. c. 80, s. 27.

(*h*) It is unnecessary, on an adjournment into chambers, to insert a direction for liberty to state special circumstances in a decree or order (note (*c*), p. 144, *supra*). But where a plaintiff is allowed to go into evidence in chambers, in support of a point in his case raised at the hearing, but which formed no part of the prayer in his bill (*e.g.*, whether valuable consideration was really given, when the settlement under which he claims is *primâ facie* voluntary), there must be an order drawn up directing the inquiry, and the case cannot proceed before the chief clerk on a simple adjournment into chambers (*Kelson* v. *Kelson*, 9 Hare, App. lxxxvi. ; and see note (*r*), to Ord. XXXV. 19, p. 550, *post*). Special directions when necessary.

When a cause is adjourned to chambers, the reservation of costs is implied, without an express direction to that effect (*Wallis* v. *Bastard*, 2 W. R. 47 ; and see *Leeds* v. *Lewis*, 3 Jur. N. S. 1290) ; so too, when *vice versâ*, the cause is adjourned into court (*Dicken* v. *Hamer*, 2 L. T. N. S. 276 ; see *Re Fellows*, 2 Jur. N. S. 62, from which it seems that a petition ought not to ask for the costs "incidental to an inquiry" in chambers generally), and see next page as to costs of proceedings in chambers generally. Costs reserved without special direction.

When a cause is adjourned to chambers, or any directions are given in court to be acted on in chambers, a registrar's note must be obtained, 3rd Judges Regul. Aug. 8, 1857, Appendix, liii., *post*. Practice on adjournment into chambers.

See further as to proceedings on adjournment into chambers, Daniell, 1208.

(*i*) For the practice as to adjourned summons to take the judge's opinion on any point in the certificate, see *post*, sect. 33 and notes ; and as to adjournment into court upon application to vary the chief clerk's certificate, see notes to sect. 34, *infra*, and see further, as to adjournment into court, note (*c*), p. 144, *ante*, and (*w*), p. 551, *post*.

The hearing of the case in court when adjourned, is only a continuation of the hearing in chambers (*Leeds* v. *Lewis*, 3 Jur. N. S. 1290), the case being generally brought on in court as a motion by the party who took out the summons in chambers. And see *Jaquet* v. *Jaquet*, 7 W. R. 543, where the Master of the Rolls refused to hear in support of the summons a party who did not join therein.

It is in the discretion of the judge to make a rule that he will hear matters requiring his *personal attention* (see note (*b*), p. 144, *ante*), in court and not in chambers, *Re Agricultural Cattle Insurance Company*, 11 W. R. 330, 386. Matters before judge heard in court *or* in chambers.

XXVIII. The mode of proceeding before the Master of the Rolls and Vice-Chancellors respectively at chambers shall be by summons, and as near as may be according to the form now adopted by the judges of the superior courts of common law when sitting at chambers (*k*). Mode of proceeding before judges at chambers to be by summons as at common law.

(*k*) As to the practice in chambers, see Ord. XXXV. pp. 543—562 ; and Regul. as to business, Aug. 1857, Appendix, p. liii., *post*. Practice in chambers generally.

For forms of summons in chambers, see Appendix, pp. xxi.—xxiii., *post*, and as to service of summons, Ord. XXXV. 5—8, p. 545, *post*, and as to appearances of parties summoned, Ord. XXXV. 9—11, p. 546, *post*.

Where a matter stands over in judge's chambers, it is only adjourned, and the costs of obtaining a new appointment, and giving notice thereof, will be disallowed (Ord. XXXV. 14, p. 548, *post*, and *Re Catlin*, 18 Beav. 512). See also, as to applying by summons for the further consideration of causes originating in chambers, 18th Regul. as to business, Aug. 1857 (Appendix, p. lv., *post*). And where small leaseholds had been ordered to be sold, the Hearing and further consideration.

15 & 16 Vict. c. 80, s. 28.

proceeds were distributed among numerous parties, upon the certificate of the chief clerk, *without* adjournment, to save expense, the purchasers being served with a summons to show cause in chambers why the proceeds should not be distributed by the chief clerk (*Thorp* v. *Owen*, 2 Sm. & G. App. i.).

Counsel in chambers.

Counsel are not heard in chambers before the chief clerk (*Dipple* v. *Corles*, 22 L. J. Ch. 15); and see Ord. XL. 29, p. 589, *post*, which provides that the costs of counsel attending in judge's chambers are not in any case to be allowed, unless the judge certifies it to be a proper case to be argued by counsel, as to which see *Wroughton* v. *Colquhoun*, 1 De G. & Sm. 357; *Russell* v. *Nicholls*, 15 Sim. 151. The Master of the Rolls always certifies for counsel unless he declares the contrary (*Greville* v. *Greville*, 27 Beav. 598; followed by V.-C. Wood in *Graham* v. *Graham*, Jo. 624). The practice as to counsel being heard before the judge in chambers varies in different judges' chambers. As laid down by V.-C. Wood, the rule is that, if one side only desires to be heard by counsel, the application is heard in chambers: if both wish to be heard by counsel, it is adjourned into court (*Rumbold* v. *Forteath*, 3 K. & J. 44, 47). The Master of the Rolls, however, is in the habit of hearing counsel on both sides in chambers, while V.-C. Stuart and V.-C. Malins, as a general rule, decline to hear counsel at all in chambers (cf. generally, *Harrison* v. *Mayor of Southampton*, 29 L. T. 61; *Ex parte Bunn*, 24 Beav. 137; *Hudson* v. *Carmichael*, 18 Jur. 852; *Re Bennett*, 18 Jur. 33); and see *infra*, under head "where counsel have been heard."

COSTS IN CHAMBERS.

As to the costs of a creditor who succeeds in a claim before the chief clerk, see Ord. XL. 24, p. 588, *post*; and as to the costs of a creditor failing in a claim before the chief clerk, see *Hatch* v. *Searles*, 2 Sm. & G. 157; where it was held that the Court has jurisdiction to order them to be paid by the creditor, though he was originally not a party to the cause, and was prevented by the Court from proceeding at law (cf. *Yeoman* v. *Haynes*, 24 Beav. 127); *Bentley* v. *Bentley*, 1 N. R. 390; and the Court ordered such unsuccessful claimant to pay the costs though an appeal was pending, *Colyer* v. *Colyer*, 10 W. R. 748.

Abandoned summons.

The taxed costs of an abandoned summons will be ordered to be paid by the party taking it out (*Lister* v. *Bell*, 5 Jur. N. S. 115; and see *Tucker* v. *Herneman*, 24 L. J. Ch. 456), and compare note (*y*), p. 587, *post*, as to costs of abandoned motions.

For the mode of drawing up orders made at chambers, see sects. 14, 15, *supra*; orders made in chambers are enforced by attachment, &c. see p. 513, *post*, and as to four-day orders, see Daniell, 1889, note.

APPEALS FROM CHAMBERS.

The Court of Appeal will not generally interfere with the discretion of judges at chambers, by allowing appeals from *orders made in the course of prosecuting a decree*, *Re McVeagh*, 1 D. J. S. 399; *Snowdon* v. *Metropolitan Railway*, *ibid.* 408. Thus, in *Cookes* v. *Cookes*, 2 D. J. S. 526, it was held that the Court of Appeal would not (except in extreme cases,) distrust the selection of a receiver by a judge, unless there was some objection of principle to the person affected; and see *Ley* v. *Ley*, 27 L. T. 267; and *Re Agriculturist Cattle Insurance Company*, 3 D. F. J. 194; where the L.JJ. ordered the appointment of a person selected by the chief clerk as official manager, to be discharged, without prejudice to the judge's reappointing him, if in the exercise of his discretion he thought fit to do so.

Appeal court will not vary orders made merely in prosecution of a decree.

But orders of an original nature made in chambers may be appealed from.

Where counsel have been heard.

But in a case where, but for this Act, the application and the order *would have been made in court*, with a consequent right of appeal, an order made in chambers was allowed to be appealed from, *Snowdon* v. *Metropolitan Railway Company*, 1 D. J. S. 408; *Ridgway* v. *Newstead*, 4 De G. & J. 15. Parties are entitled, in cases of this nature, to an opportunity of having their case *argued by counsel* if they think fit, and generally the Court of Appeal will decline to hear an appeal from chambers, unless the case has been argued by counsel below, *Stroughill* v. *Gulliver*, 1 De G. & J. 113; *Hutchinson* v. *Swift*, 13 W. R. 532; but see *Snowdon* v. *Metropolitan Railway Company*, 1 D. J. S. 408.

Appeals from the judge's decision in chambers.

An appeal to the Court of Appeal must be from the certificate *as a whole*, *i.e.* when it is made an order of the judge by being approved by him after an application to vary. Therefore if any party has obtained the opinion of the

judge on any particular point under sect. 32, *infra*, and desires to appeal from such opinion, he ought to wait till the certificate is made and approved as a whole, and then move to vary it on account of the impropriety of the order on which it is founded, *Rhodes* v. *Rhodes*, 1 L. R. Ch. 483. Thus the practice as to appeals to the Lords Justices from orders made by the judge in chambers, was stated by the Master of the Rolls in *York and North Midland Railway Company* v. *Hudson*, 18 Beav. 70, 73, to be, that an application was made in court to vary the certificate (see sect. 34), when an order would be made, without further argument, to the effect of the decision in chambers, which order would enable the parties to appeal. See *Rhodes* v. *Ibbetson*, 4 D. M. G. 787 (where, under the circumstances, the *pro formâ* application was made to the judge in chambers), and *Saunders* v. *Druce*, 3 Drew. 139 (where even the *pro formâ* application appears to have been thought unnecessary).

15 & 16 Vict. c. 80. s. 28.

For the mode of prosecuting business in chambers during vacations, see Ord. XXXV. 58, 59, p. 561, *post*.

Power to the judges to direct what matters, &c., shall be heard and investigated by themselves, and what by their chief clerks.

XXIX. From and after the first day of Michaelmas term, one thousand eight hundred and fifty-two, the Master of the Rolls and the Vice-Chancellors respectively shall have the sole power (subject to any rules which may be made by the Lord Chancellor with the advice and assistance of them or any two of them) to order what matters and things shall be investigated by and before their respective chief clerks, either with or without their direction, during their progress, and what matters and things shall be heard and investigated by themselves; and particularly if the judge shall so direct, his chief clerks respectively shall take accounts, and make such inquiries as have usually been prosecuted before the chief clerks of the present Masters; and the judge shall give such aid and directions in every or any such account or inquiry as he may think proper, but subject nevertheless to the right hereinafter provided for the suitor to bring any particular point before the judge himself (*l*).

Right to suitor to bring any point before the judge.

(*l*) As to the right of parties to see the judge personally, see note (*b*) to sect. 13 (p. 144, *ante*).

It is in the discretion of the judge to hear matters, which he is called on to hear personally, in chambers, or adjourn them into court (as to which see sect. 27); *Re Agricultural, &c. Company*, 11 W. R. 330, 386.

Judge may sit in court or in chambers.

See as to a compromise being held binding, though not brought before the judge personally, *Re Home Counties' Life Assurance Company, Ex parte Garstin*, 10 W. R. 457.

Power to chief clerks to issue advertisements and summonses, to administer

XXX. Each chief clerk shall, for the purpose of any proceedings directed by the Master of the Rolls or any Vice-Chancellor to be taken before him, have full power to issue advertisements, to summon parties and witnesses, to administer oaths, to take affidavits and acknowledg-

15 & 16 Vict. c. 80, s. 30.

ments (*m*) other than acknowledgments by married women, to receive affirmations, and, when so directed by the judge to whose court he is attached, to examine parties and witnesses either upon interrogatories or *vivâ voce*, as such judge shall direct (*n*).

oaths, &c., as the judge shall direct.

Evidence used in chambers.

(*m*) As to what affidavits may be used in chambers, see Ord. XXXV. 27, 28, p. 555, *post*, and note (*e*), p. 130, *ante;* and *Basham* v. *Smith*, 22 Beav. 190, and as to evidence in chambers generally, Daniell, 1078, Ayckb. 497.

Examination on interrogatories.

(*n*) As to examination of witnesses upon interrogatories, see *Davey* v. *Durant*, 24 Beav. 411, 2 De G. & J. 506; *Wing* v. *Harvey*, 17 Jur. 481; *Croskey* v. *European, &c. Shipping Company*, 14 W. R. 514.

Examination of witnesses before the chief clerk.

The practice as to examinations before the chief clerk is to be the same as in the case of the examination of witnesses before an examiner, subject to any special directions which may be given in any particular case. Ord. XXXV. 30, p. 555, *post*.

Summons or subpœna necessary.

But the order of 5th Feb. 1861 (p. 620, *post*), only applies to causes where issue is joined, and *before the hearing*, see note (*c*), p. 621, and r. 15, p. 625, *post;* so that the rule as to each party's producing his own witnesses for cross-examination does not apply to proceedings in chambers, *Stebbing* v. *Ablee*, 2 Jur. N. S. 1161; *Jenner* v. *Morris*, 10 W. R. 640.

Therefore if the examination is to be before the chief clerk, he can enforce attendance by summons, and for form of such summons, see Appendix, p. xxiii. *post*. If the examination is before an examiner, a subpœna should be issued. See Ord. XXXV. 29, p. 555, *post*, and for form of subpœna, see Appendix, p. vii. *post*.

Depositions.

See further as to the mode of examination before the chief clerk, *Rogers* v. *Mort*, 10 Hare, App. liii. (from which it seems that he need not take down the depositions in his own handwriting), *Re London, Birmingham, and Bucks Railway Company*, 6 W. R. 141.

Under Company's Act, 1862.

As to the power to examine witnesses in chambers in winding-up cases since the Company's Act, 1862, see *Re English Joint Stock Bank*, 3 L. R. Eq. 203, 207.

Examination of accounting party.

When an *accounting party* brings in his accounts in chambers, the other side may examine him *vivâ voce;* but must give notice of the points on which they wish to examine him, *Wormsley* v. *Sturt*, 22 Beav. 398; *Re Lord*, 2 L. R. Eq. 605; see Ord. XXXV. 34, p. 556, *post*. In such a case the accounting party may be ordered to produce documents (*ibid.*).

Practice when party examined in chambers refuses to answer.

If a party examined in chambers refuse to give a sufficient answer, the judge should be asked to examine him personally, and if he then refuse to answer he may be committed at once, *Hayward* v. *Hayward*, Kay, App. xxxi. If the examination is by interrogatories, the first step should be to except to the answer, *Croskey* v. *European, &c. Shipping Company*, 14 W. R. 514, and see Daniell, 1083.

Examination before judge in person.

A witness has a right, if he wishes, to require that his examination should be conducted before the judge and in person (*Re London and County Assurance Company*, 5 W. R. 794, and see note (*b*), p. 144, *ante;* and cf. *Hayward* v. *Hayward*, l. c.; *Re Home Counties Life Assurance Company*, 10 W. R. 457; *Re Agriculturist Cattle Insurance Society*, 3 D. F. J. 194; *Ex parte Bunn*, 24 Beav. 137, where on a witness refusing to be sworn before the chief clerk, on the ground that he required the assistance of counsel, it was held, on a motion to commit the witness, that the proper course was, after he was sworn, to apply that his examination might be taken before the judge, or an examiner, or, if necessary, that the case might be adjourned into court). See, too, *Re the Esgair Mwyn Mining Company*, 8 W. R. 669, where it was held, that, although the chief clerk had power in a winding-up case to summon a witness before him until the list of contributories was definitely settled, yet a motion to commit such witness for refusing to attend could not be enter-

tained until such refusal had been certified by the judge in chambers under the 11 & 12 Vict. c. 45. 15 & 16 Vict. c. 80, s. 30.

In one case, witnesses, who had been examined before the hearing, upon interrogatories, were examined again *vivâ voce*, before the chief clerk, as to the same matters (*Rogers* v. *Mort*, 10 Hare, App. liii. Cf. *Hextall* v. *Cheadle*, 1 Sm. & G. 78; *Routh* or *Rooth* v. *Tomlinson*, 16 Beav. 251). Examination first in Court, and again in chambers.

No special order is required for the transfer of a witness's examination from chambers to the examiner's office (*Stebbing* v. *Atlee*, 26 L. J. Ch. 255). Transfer of examination to examiner's office.

XXXI. Parties and witnesses so summoned shall be bound to attend in pursuance of any such summons; and shall be liable to process of contempt, in like manner as parties or witnesses are now liable thereto in case of disobedience to any order of the said Court, or in case of default in attendance, in pursuance of any order of the said Court, or of any writ of subpœna ad testificandum (*o*); and all persons swearing or affirming before any such chief clerk shall be liable to all such penalties, punishments, and consequences for any wilful and corrupt false swearing or affirming contained therein as if the matters sworn or affirmed had been sworn and affirmed before any person now by law authorised to administer oaths, to take affidavits, and to receive affirmations. Parties, &c., not attending liable to process of contempt and to penalties for false swearing, &c.

(*o*) See notes to preceding section. A writ of *habeas corpus* may be issued to bring up a prisoner under a common law process, whose attendance is required in chambers (*Buckeridge* v. *Whalley*, 6 W. R. 180). Prisoner how brought to chambers.

XXXII. The directions to be given by the Master of the Rolls or any Vice-Chancellor for or touching any proceedings before his chief clerk shall require no particular form, but the result of such proceedings shall be stated in the shape of a short certificate to the judge (*p*), and shall not be embodied in a formal report, unless in any case the judge shall see fit so to direct; and when the judge shall approve of such certificate or report he shall sign the same in testimony of his adopting the same. Result of proceedings before chief clerk to be embodied in form of short certificate, &c.

(*p*) As to the practice of attending to settle the certificate, see Daniell, 1239, Ord. XXXV. 26, p. 554, *post*, and as to giving notice to parties *served with the decree*, see note (*c*), p. 197, *post*.

The chief clerk's certificate is not a judgment so as to carry interest, note (*f*), p. 6, *ante*. Form of chief clerk's certificate.

The certificate is not to set out the decree or order on which it is founded, but is to refer to it as directed by Ord. XXXV. 47, p. 559, *post*.

See schedule M. for form of certificate, Appendix, p. xxiv., *post*.

In cases of account the certificate is not to set out the account to refer to it as directed by Ord. XXXV. 46 (p. 558, *post*). In cases of account.

15 & 16 Vict. c. 80, s. 32.

Where the chief clerk referred the accounts to an accountant (under sect. 43), and filed his report as part of the certificate, it was held irregular, *Hill* v. *King*, 9 Jur. N. S. 527 ; and see *Re Agriculturist Cattle Insurance Society*, 3 D. F. J. 194.

Chief clerk may state facts and reserve point.

The certificate may state facts and reserve the point to which they refer for the consideration of the Court, *Stott* v. *Meanock*, 10 W. R. 605.

But must state the grounds of the result arrived at.

A certificate which finds an amount to be due should be in such a form as to enable the Court to ascertain in what way the amount found due was arrived at, and, therefore, where an inquiry had been directed as to what was due from the defendants to the plaintiff for work done and materials supplied under several contracts, and the chief clerk by his certificate simply stated the amounts which he found due on the several contracts, without giving any further particulars or stating the grounds for his conclusion, the certificate was discharged without prejudice to any questions, *M'Intosh* v. *Great Western Railway Company*, 1 D. J. S. 443.

No exceptions to lie to certificate, &c.

Parties at liberty to take opinion of judge upon any particular point.

XXXIII. No exceptions shall lie to any certificate or report of the chief clerk, although signed and adopted by the judge ; but any party shall, either during the proceedings before such chief clerk, or within such time after such proceedings shall have been concluded, and *before the certificate or report shall have been signed and adopted*, as the Lord Chancellor shall by any general order direct (*q*), be at liberty to take the opinion of the judge upon any particular point or matter arising in the course of the proceedings, or upon the result of the whole proceeding, when it is brought by the chief clerk to a conclusion (*r*).

(*q*) The application under this section is by motion, *Robertson* v. *Norris*, 1 Giff. 428, or (more usually) by summons, see Daniell, 1241 ; and see *Cooper* v. *Everitt*, 2 W. R. 388.

The time is four clear days, Ord. XXXV. 48, 49, p. 559, *post*.

Objections when and how to be made to the judge.

The objections to the chief clerk's finding should, if possible, be taken before the certificate is made, and at once referred to the judge in chambers, so as to save expense (*Parr* v. *Lovegrove*, 6 W. R. 201). So also in *Halliley* v. *Henderson* (4 Jur. N. S. 202), it was held that a summons taken out by a creditor after the chief clerk has made his certificate, should be referred to the judge in chambers, and not adjourned into court. See Ord. XXXV. 43, p. 558, *post*.

The opinion of the judge as to the principle on which an account should be taken was obtained by motion, *Robertson* v. *Norris*, 1 Giff. 428 ; and see *Twyford* v. *Traill*, 3 M. & C. 650, there cited.

(*r*) See for the practice of taking the judge's opinion on the certificate as a whole, *Morgan* v. *Hatchell*, 19 Beav. 86 ; Daniell, 1241.

Certificate, &c., signed and adopted by judge, binding on all parties, unless discharged or varied.

XXXIV. *When any certificate or report of the chief clerk shall have been signed and adopted by the judge* the same shall be filed in like manner as reports are now filed, and shall thenceforth be binding on all the parties to the proceedings (*s*), unless discharged or varied, either at chambers or in open court, according to the nature of the

case, upon application by summons or motion (*t*) within such time as shall be prescribed in that behalf by any general order of the Lord Chancellor (*u*); and nothing herein contained shall prejudice or affect the power of the Court at any time to open any such certificate or report upon the same or the like grounds as any report of a Master of the said court which has been absolutely confirmed may now be opened (*v*). 15 & 16 Vict. c. 80, s. 34.

(*s*) The fact of a claim being disallowed by the chief clerk in one suit, was held no bar to its being prosecuted in another, *Teed* v. *Beere*, 7 W. R. 394; but see *contrà*, *Thomas* v. *Griffith*, 2 Gif. 504, affirmed on appeal to full Court, 2 D. F. J. 562. See, however, as to new claimants coming in after the certificate is adopted, note (*p*), p. 547, *post*, and before it is adopted, note (*q*), *supra*. Certificate, how far an estoppel.

(*t*) The usual mode of proceeding to vary a certificate is by summons; and the Court will not vary a certificate on further consideration, unless objected to in the usual way (*Lambe* v. *Orton*, 8 W. R. 111, where it was said the certificate was to be treated as a Master's Report under the old practice, which was not allowed to be challenged unless excepted to in the proper way; see, too, *Rotherham* v. *Batteson*, 2 W. R. 340). The application to vary will be adjourned into court, if necessary, Seton, 55. Application to vary how made.

If the cause is coming on to be heard on further consideration, such hearing and the application to vary will come on together, *Crompton* v. *Huber*, 3 W. R. 347; *Hudson* v. *Carmichael*, 18 Jur. 852. And where such hearing and application to vary come on together, it may be necessary to appeal from the order as a whole, see *Bloxam* v. *Whipham*, 8 W. R. 2. And as to appeals from the judges' decision on application to vary, see note (*k*), *ante*. Coming on with further consideration.

When there was error apparent in the chief clerk's certificate, and the decree founded thereon, the Court altered and corrected both the decree and the certificate, without a rehearing, notwithstanding this section and Ord. XXXV. 52 (p. 560, *post*) (*Cradock* v. *Owen*, 2 Sm. & G. 241); and cf. *Purcell* v. *Manning*, 3 Jur. N. S. 1070; where, in a somewhat similar case, the Court gave leave to move to vary the chief clerk's certificate, and to present a petition of rehearing. As to rectifying a direction to take accounts on rehearing, see *Pennell* v. *Millar*, 23 Beav. 172. Where error is apparent.

Affidavits not used before the chief clerk cannot be used on applications to vary his certificate, *Re Hooper*, 9 Jur. N. S. 570; and see *Whitworth* v. *Whyddon*, 2 M. & G. 56; *Fleming* v. *East*, Kay, App. lii. Nor is cross-examination allowed on those affidavits which were used before him, *Dawkins* v. *Morton*, 10 W. R. 339. Evidence on application to vary.

(*u*) The time is eight clear days from the filing of the certificate, Ord. XXXV. 52, p. 560, *post*, except in cases of certificates to be acted upon by the Accountant-General without further orders, in which case the time is two clear days from the filing, Ord. XXXV. 53, *ibid.*; and certificates passing receiver's accounts may be approved and acted on at once, Ord. XXXV. 54, *ibid.* Time for summons to vary certificate.

Where the summons had been *obtained* within the eight days, even though not returnable until after that time, it was held sufficient (*Wycheley* v. *Barnard*, John. 41); and where it is impossible to move on a seal day within the eight days the Court allows, the motion to be made on a day not a seal day, and to be saved till next seal, *Cross* v. *Maltby*, 8 W. R. 646. The eight days run during vacations (*Ware* v. *Watson*, 7 D. M. G. 739; and see *Re Jones*, 8 W. R. 56). To be *obtained* within eight days.

When a motion was made for payment of money found due on a certificate before the eight days had elapsed, the Court ordered the motion to stand over till the expiration of that period (*Douthwaite* v. *Spensley*, 18 Beav. 74).

(*v*) After the eight days have elapsed a certificate cannot be discharged or varied, except under very special circumstances (*Howell* v. *Kightly*, 8 D. M. Varying after eight days.

15 & 16 Vict. c. 80, s. 34.

G. 325), for the certificate, whatever effect it may have on the hearing on further consideration, is conclusive against parties, who have neither taken out a summons nor moved to have it varied (*Smith* v. *Armstrong*, 6 D. M. G. 150; see *Jaquet* v. *Jaquet*, 7 W. R. 543; *Leigh* v. *Turner*, 14 W. R. 36); and a certificate signed and approved by the judge becomes, at the expiration of such eight days, equivalent to a report absolutely confirmed under the old practice (*Ware* v. *Watson*, l. c.).

Error *apparent* rectified after the eight days.

See *Cradock* v. *Owen*, 2 Sm. & G. 241, as to varying error apparent in the certificate after the eight days without a rehearing, and as to rectifying directions to take accounts on a rehearing, see *Pennell* v. *Millar*, 23 Beav. 172; and generally, as to appeals from orders made in chambers, see notes p. 150, *ante*.

Practice of opening biddings.

Before the eight days have elapsed an application to reopen biddings might formerly be granted (*Bridger* v. *Penfold*, 1 K. & J. 28; *Osborne* v. *Foreman*, 8 D. M. G. 122; 6 H. L. Cas. 556; *Waterhouse* v. *Wilkinson*, 1 H. & M. 636; *Ewing* v. *Waite*, 1 L. R. Eq. 440); but this practice is now abolished by the "Sale of Land by Auction Act," 1867 (30 & 31 Vict. c. 48), sect. 7, which

Abolished by 30 & 31 Vict. c. 48, ss. 7—9.

enacts that, "The practice of opening the biddings on any sale by auction of land under or by virtue of any order of the High Court of Chancery shall, from and after the time appointed for the commencement of this Act (viz., Aug. 1, 1867), be discontinued, and the highest *bonâ fide* bidder at such sale, provided he shall have bid a sum equal to or higher than the reserved price (if any), shall be declared and allowed the purchaser, unless the Court or judge

Except in cases of fraud.

shall, *on the ground of fraud*, or *improper conduct in the management of the sale*, upon the application of any person interested in the land (such application to be made to the Court or judge before the chief clerk's certificate of the result of the sale shall have become binding), either open the biddings, holding such bidder bound by his bidding, or discharge him from being the purchaser, and order the land to be resold upon such terms as to costs or otherwise as the Court or judge shall think fit."

Sect. 5 of the same Act enacts, "That the particulars or conditions of sale by auction of any land shall state whether such land will be sold *without reserve*, or subject to a reserved price, or whether a right to bid is reserved;

Rule respecting sale without reserve, &c.

if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person."

As to reserving biddings in chambers, see 13 & 14 Judges' Regul., Aug. 1857, Appendix, p. lv., *post*.

Summons for fresh certificate.

Where a certificate made under a decree has been discharged, a fresh one may be obtained by summons, *Cross* v. *Maltby*, 8 W. R. 646.

[Section 35 repealed sections 13, 14, and 15 of 3 & 4 Wm. 4, c. 94, which gave the Masters power to dispose of some of the business now to be disposed of in chambers.]

All powers possessed by Masters to be exercised by judges.

XXXVI. From and after the first day of Michaelmas term, one thousand eight hundred and fifty-two, all or any of the powers, authorities, and jurisdiction given to the Masters in Ordinary of the said court by any Act or Acts then in force may be exercised by the Master of the Rolls and Vice-Chancellors respectively.

[Sect. 37 gave power to the judges to dispose in open court of causes, &c. then pending before the Masters.]

Power to Lord Chancellor, with advice, &c.,

XXXVIII. It shall be lawful for the Lord Chancellor, with the advice and consent of the Master of the Rolls and Vice-Chancellors, or any two of them, and they are

hereby required, forthwith to make and issue general rules and orders for regulating the times and form and mode of procedure, before the Master of the Rolls and Vice-Chancellors respectively sitting at chambers, and their respective chief clerks, and generally the practice of the said court in respect of the matters to which this Act relates, and for regulating the fees and allowances to solicitors of the said court in respect to such matters, and also for regulating the fees to be payable by suitors of the said court to the officers thereof in respect of the business to be conducted before the Master of the Rolls and Vice-Chancellors respectively sitting at chambers, and their respective chief clerks; and such rules and regulations may from time to time be rescinded, altered, varied, or added to by the like authority; and all such rules and regulations as aforesaid shall take effect as general orders of the said court: Provided always, that no greater amount of fees shall be payable by the suitors of the said court to the officers thereof, in respect of the business to be conducted before the Master of the Rolls and the Vice-Chancellors respectively sitting at chambers, and their respective chief clerks, than is now levied in respect of similar or analogous business in the Master's offices.

15 & 16 Vict. c. 80, s. 38.

of judges to make rules and orders for regulating the mode of procedure at chambers, payment of fees, &c.

[Sect. 39 related to the conduct of business then pending before the Masters.]

XL. From and after the first day of Michaelmas term, one thousand eight hundred and fifty-two, it shall be lawful for the Court or for any judge thereof when sitting at chambers to receive and act upon the opinion of conveyancing counsel in actual practice, to be nominated as hereinafter mentioned, in all cases in which, according to the present practice of the court and of the Master's office, it has been usual for the Master to require or receive the opinion of conveyancing counsel for his aid and assistance in the investigation of the title to an estate, with a view to an investment of money in the purchase or on mortgage thereof, or with a view to a sale thereof (*x*), or in the settlement of a draft of a conveyance, mortgage, settlement, or other instrument (*y*), or otherwise, and in

Power to judges at chambers to take the opinion of conveyancing counsel in certain matters.

15 & 16 Vict. c. 80, s. 40.

such other cases as the Lord Chancellor shall by any general order direct; but it shall be competent for any party to object to any opinion of any such counsel when he shall deem it open to objection, and thereupon the point in dispute shall be disposed of by the Court, or by the judge sitting in chambers, according to the nature of the case.

Parties may object to such opinion, which may be disposed of in chambers or open court.

Reference to conveyancing counsel.

(*x*) For the mode of obtaining the opinion of conveyancing counsel of the Court of Chancery, see Ord. II. 3, p. 384, *post*; and as to referring to them on sales under the order of the Court, see 15 & 16 Vict. c. 86, s. 56, p. 220, *post*; and as to their fees, see notes (*c*) and (*d*), p. 590, and (*f*), p. 591, *post*.

The judge in chambers will, in a proper case, direct the opinion of one of the conveyancing counsel to be taken, *Yates* v. *Plumbe*, 2 Sm. & G. 174.

Under Lands Clauses Act and Settled Estates Act.

For the practice as to reference to chambers and the conveyancing counsel on reinvestment in land under the Lands Clauses Act, sect. 69, see note (*g*) p. 37, *ante*; and on sales under the Settled Estates Act, see note (*n*), p. 241, *post*.

Discretion as to employing conveyancing counsel.

(*y*) In ordinary cases, where a deed has to be approved by the Court, the Court has a discretion (see notes to 15 & 16 Vict. c. 86, s. 56, p. 220, *post*), whether it will refer a matter to the conveyancing counsel or not, see *Blaxland* v. *Blaxland*, 9 Hare, App. lxviii.; but as a general rule, where *infants*, or persons under disability are concerned, the title is referred to, or the conveyance settled by, the conveyancing counsel. And as to the manner of settling deeds to be executed by incapacitated persons, under the decree of the Court, the consideration monies having been paid into court, see *Harvey* v. *Brooke*, 9 Hare, App. xi.; where it was held that the cause might stand over, and on its being again in the paper, the plaintiff being prepared with an affidavit of the correctness of the engrossment of the deed, and the certificate of the Accountant-General of the payment of the money into court, the Court would direct the registrar to sign a memorandum that the deed produced was the deed to be executed by the incapacitated person. The deed is first sent to the judge's chambers, and then to the conveyancing counsel (*Re Bennett*, 18 Jur. 33; see *Pegg* v. *Wisden*, 16 Jur. 1105).

Procedure where infants, &c., are interested.

And similarly, where a sale or lease of lands in which infants, &c., are interested, is ordered under the Settled Estates Acts, *Re Eyre*, 4 K. & J. 268.

Or where a wife's equity to a settlement is decreed.

When dispensed with.

But where the expense of a reference to the conveyancing counsel would have been out of proportion to the amount to be settled, the trusts were inserted in the order on the petition, *Chamberlain* v. *Chamberlain*, 1 Sm. & Giff. App. xxviii.; nor is it an imperative rule, that the title of land in which the purchase monies of settled lands are about to be invested must in every case be laid before the conveyancing counsel of the court (*Re Jones*, 7 W. R. 171; for form of order in which, see 7 W. R. 523; and see *Gibson* v. *Wollard*, 5 De M. G. 835).

Model conveyance.

And where land is ordered to be sold in lots, and one conveyance has been settled by the conveyancing counsel, it may be adopted by the chief clerk for all the rest in which no special circumstances exist to render such a course inconvenient, *Re Eyre*, 4 K. & J. 268.

Or lease.

And as to model leases under the Settled Estates Act, see note to sect. 10 of that Act, p. 255, *post*.

Deeds how settled by conveyancing counsel.

As to the manner of settling deeds to be executed by incapacited persons under the decree of the Court, see *Harvey* v. *Brooke*, 9 Hare, App. xi.; *Re Bennett*, 18 Jur. 33; *Pegg* v. *Wisden*, 16 Jur. 1105.

Power to Lord Chancellor to

XLI. It shall be lawful for the Lord Chancellor t

nominate any number of conveyancing counsel in actual practice, not less than six, who shall have practised as such for ten years at least, to be the conveyancing counsel (*z*) upon whose opinion the Court, or any judge thereof, may act in any of the cases last before mentioned, and to supply vacancies in such list from time to time, and to distribute the business among such counsel in such order and manner as to the Lord Chancellor shall seem fit (*a*). 15 & 16 Vict. c. 80, s. 41.

nominate not less than six conveyancing counsel of ten years' practice, &c.

(*z*) The present conveyancing counsel are Mr. Hayes, Mr. Lewin, Mr. Dart, Mr. Brickdale, Mr. Vaughan Johnson, and Mr. Charles Hall.

(*a*) The Court will not generally direct a reference to one conveyancing counsel in particular (*Re Martin*, 22 L. J. Ch. 248); but it may do so where the circumstances of the case render it expedient, Ord. II. 5. As to the mode of distribution generally, see Ord. II. 1, 2—4, 5, p. 383, *post*.

Reference to one counsel in particular.

XLII. It shall be lawful for the said Court or any judge thereof, in such way as they may think fit, to obtain the assistance of accountants (*b*), merchants, engineers, actuaries, or other scientific persons, the better to enable such Court or judge to determine any matter at issue in any cause or proceeding (*c*), and to act upon the certificate of such persons (*d*).

Power to obtain the assistance of accountants, merchants, &c.

(*b*) The scale of charges allowed for an accountant in chambers is the same as that allowed by the general orders in bankruptcy, *Meymott* v. *Meymott*, 33 Beav. 590. See as to the employment of accountants, *Re London, Birmingham, and Bucks Railway Company*, 6 W. R. 141. It seems they need not always be employed in the presence of the parties (*ibid.*).

Costs of accountant.

(*c*) See note (*b*) to sect. 2 of Lord Cairns' Act (p. 261, *post*), as to awarding damages in Chancery; and as to the effect of the powers given by this section in extending the jurisdiction of equity in questions of damages, &c., see *M'Intosh* v. *The Great Western Railway Company*, 3 Sm. & G. 146; and comp. *Stokes* v. *City Offices Company*, 13 W. R. 537; but see s. c. 11 Jur. N. S. 560; *Mildmay* v. *Methuen*, 1 Drew. 215; and the other cases cited in note (*c*) to sect. 10 of this Act.

21 & 22 Vict. c. 27.

(*d*) As to the form of the chief clerks' certificate, where such assistance has been employed, see note to sect. 32.

XLIII. The allowances in respect of fees to such conveyancing counsel, accountants, merchants, engineers, actuaries, and other scientific persons shall be regulated by the taxing master of the said court, subject to an appeal to the judge to whose court the cause or matter shall be attached, whose decision shall be final (*e*).

Taxing master to regulate fees to conveyancing counsel, &c., subject to appeal.

(*e*) This section does not authorise a reference to the taxing-master of accounts not connected with bills under taxation (per L. J. Turner, in *King* v. *Savery*, 8 D. M. G. 311). See note (*b*), p. 576, *post*.

15 & 16 Vict. c. 80, s. 59.

[The sections omitted relate exclusively to the salaries and pensions of the judges, chief and junior clerks, and other officers of the court (see p. 145, *ante*).]

Nothing to affect the rights, &c., of Accountant-General as a Master in Ordinary.

LIX. Nothing herein contained shall prejudice or affect the rights, duties, or privileges of the Accountant-General of the said Court of Chancery as a Master in Ordinary of the said court, or any salary or other payment payable to the said Accountant-General as such Master in Ordinary, or his right or title to any retiring allowance under any Act or Acts of Parliament now in force, nor shall the said Accountant-General be called upon or required to do or perform any duties or services as such Master in Ordinary, other than such as are now usually performed by him.

The retiring Lord Chancellor may deliver written judgments within six weeks after his resignation.

LX. Whereas it has frequently happened that after cases have been fully heard by the Lord Chancellor in the Court of Chancery, and are standing for judgment, the Lord Chancellor [has delivered up the Great Seal without being able, by reason of other urgent public business, to deliver judgment therein, and much inconvenience and expense to the parties has been thereby occasioned:

For remedy thereof be it enacted, that in every such case it shall be lawful for the person who has so delivered up the Great Seal, within six weeks after he shall have delivered up the same, to give in to the registrar of the said court a written judgment therein, signed by him; and a decree or order, as the case may require, shall be drawn up in pursuance of such judgment; and every such decree or order shall have the same force and effect as if the judgment in pursuance whereof it is drawn up had been given in open court the day before he shall have so delivered up the Great Seal.

Construction of terms.

LXI. In the construction of this Act the expression "her Majesty" shall mean the sovereign for the time being; and the expression "Lord Chancellor" shall mean also and include the Lord Chancellor, Lord Keeper, and Lords Commissioners for the custody of the Great Seal of the United Kingdom for the time being.

IMPROVEMENT OF JURISDICTION OF EQUITY ACT.

15 & 16 VICT. CAP. 86.

An Act to amend the Practice and Course of Proceeding in the High Court of Chancery.

[1*st July*, 1852.

15 & 16 Vict. c. 86.

WHEREAS it is expedient to amend the practice and course of proceeding in the High Court of Chancery: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Practice of engrossing bills on parchment discontinued, and a printed bill to be filed instead.

I. From and after the time hereinafter appointed for the commencement of this Act, the practice of engrossing on parchment bills (*a*) of complaint or claims to be filed in the said court, and of filing such engrossment, shall be discontinued; and the clerks of records and writs of the said court shall receive and file a printed bill of complaint or claim, in lieu of an engrossment thereof, in like manner as they now receive and file such engrossment (*b*).

(*a*) The word is to include informations; see sect. 66, p. 226, *post*. Bill.
(*b*) See Ord. IX. 3, *post*. Claims are now abolished (Prel. Ord. IV.).

Writs of subpœna and summons to be abolished.

II. The writ of subpœna to appear to and answer a bill of complaint in the said court, and the writ of summons upon a claim, shall respectively be abolished (*c*).

(*c*) See Ord. X. *post*.

Defendants to be served with a printed bill in lieu of the writs of subpœna and summons.

III. In lieu of serving the defendant to a bill of complaint in the said court with a writ of subpœna to appear to and answer the same, and in lieu of serving the defendant to a claim in the said court with a writ of summons upon such claim, in the mode and according to the practice now adopted in the said court with reference to such writs respectively, the defendant shall be served with a printed bill of complaint (*d*) or claim, with an indorse-

15 & 16 Vict. c. 86, s. 3.

ment thereon, in the form or to the effect set out in the schedule to this Act (*e*), with such variations as circumstances may require, such printed bill of complaint or claim so to be served being previously stamped with a proper stamp (*f*) by one of the clerks of records and writs, indicating the filing of such bill of complaint or claim, and the date of the filing thereof.

Slight alterations may be made in writing.

Alterations in print of bill.

Printing.

Counsel's name.

Dates, &c.

(*d*) As to the mode of printing the bill see Daniell, 361; Ayckb. 14. Slight alterations, such as a transposition of Christian names, were allowed to be made in writing, *Yeatman* v. *Mousley*, 2 D. M. G. 220; but now it would seem that the proper course would be to amend the bill, see *Barnes* v. *Ridgway*, 1 Sm. & G. App. xviii., where the Court gave leave to make an amendment without re-serving the parties with a copy of the amended bill. Written alterations, made in a printed bill, but not introduced upon the record, cannot, after the hearing, even with the consent of all parties, be treated as amendments, but the record must be amended and the bill re-served (*Godwin* v. *Coulson*, 1 W. R. 485); see Daniell, 400, note (*b*).

No special circumstances will exempt a bill, filed since the passing of this Act, and not coming within sect. 6, from being printed (*Yate* v. *Lighthead*, 16 Jur. 964). The omission, however, to print counsel's name upon a claim requiring his signature did not prevent its being filed (*Coppeard* v. *Mayhew*, 22 L. J. Ch. 408; cf. *Stapleton* v. *Stapleton*, 17 L. T. 15). Dates and sums are now to be printed in figures Ord. X. 3.

Form of indorsement when defendant out of jurisdiction.

(*e*) See the indorsement, *post*, p. 227. When a defendant is out of the jurisdiction of the Court, it is necessary to apply for an order to serve him with a copy of the bill (see Ord. X. 7), within such time as the Court shall direct, and then to serve him with a copy of the bill, with an indorsement to the effect of the order of the Court (*Baines* v. *Ridge*, 9 Hare, App. xxvii.; and see *Chatfield* v. *Berchtold*, *ibid.* xxviii.). In *Sharpe* v. *Blondeau*, 9 Hare, App. xxvii., and *Wallis* v. *Vigors*, 1 W. R. 100, it was held by V.-C. Kindersley, that the indorsement in such cases need not be printed.

Indorsement to amended bill, when necessary.

Where the plaintiff requires an answer to an amended bill, he must serve a copy of such amended bill, with the usual indorsement, requiring appearance, and service of a plain copy is an intimation that no new answer is required. Subsequent service, therefore, of an indorsed copy and interrogatories after service of a plain copy is irregular, *Barry* v. *Croskey* (2), 2 J. & H. 130.

Stamp.

(*f*) In cases of emergency, several stamps, amounting together to 1*l.*, may be affixed (*Brain* v. *Brain*, 9 Hare, App. xc.; notwithstanding Ord. XXXIX. 3); and in *Kershaw* v. *Kalow*, 1 Jur. N. S. 974, leave was given to file an unstamped injunction bill, the offices being closed for the day, and the solicitor undertaking to have the bill stamped the next day. As to the course which the Court will adopt when a defendant who has been served with an unstamped copy of a bill, and does not appear, is attached, see *Hutton* v. *Smith*, 3 W. R. 153.

The filing and service of a printed bill or claim to have the same effect as the filing and issuing of writs of subpœna and summons.

IV. The filing of a printed bill of complaint or claim in the said court shall have the same effect as the filing of a bill of complaint or claim in the same court, and the issuing of a subpœna or writ of summons thereon respectively, now have (*g*), and the service upon the defendant of a printed bill of complaint or of a claim so filed, with such indorsement thereon, so stamped as aforesaid, shall

have the same effect as the service on him of a writ of subpœna or writ of summons respectively now has, and shall entitle the plaintiff in such suit to such remedies for default of appearance and otherwise as he is now entitled to in case of due and proper service of a subpœna to appear to and answer a bill of complaint or of a writ of summons upon a claim. 15 & 16 Vict. c. 86, s. 4.

(*g*) As to the meaning of these words, see *Re Boger*, 3 Jur. N. S. 930.

V. The service upon any defendant of a printed copy of a bill of complaint or of a claim in the said court shall be effected in the same manner as service of a writ of subpœna to appear to and answer a bill of complaint is now effected, save only that it shall not be necessary to produce the original bill or claim, which will be on the files of the court; provided that the Court shall be at liberty to direct substituted service of such printed bill or claim, in such manner and in such cases as it shall think fit (*h*). As to service of printed bill.

(*h*) This section does not extend the discretion of the Court in regard to substituted service (*Bones* v. *Angier*, 2 W. R. 609). In this case it was held by V.-C. Wood, that where an equitable mortgagor was abroad, and not heard of for ten years, and his son-in-law took possession of the mortgaged premises, paying no rent, and in no way recognising the title, or *acting as agent* of the original mortgagor, the mortgagee could not, on filing a bill for foreclosure, proceed by substituted service on the son-in-law, it being impossible to serve the mortgagor, for the son-in-law seemed only to be an adverse holder, while the principle of substituted service is agency. The cases on substituted service are given in note to Ord. X. 2, *post*. Discretion of the Court as to substituted service.

VI. Notwithstanding the provisions hereinbefore contained, the clerks of records and writs of the said court may receive and file a written copy (*i*) of any bill of complaint praying a writ of injunction or a writ of Ne exeat regno (*k*), or filed for the purpose either solely or among other things of making an infant a ward of the said court, upon the personal undertaking of the plaintiff or his solicitor to file a printed copy of such bill within fourteen days (*l*), and every bill of complaint so filed shall be deemed and taken to have been filed at the time of filing the written copy thereof; and a written copy of any such bill of complaint, stamped as aforesaid (*m*), and with such indorsement thereon as aforesaid, may be served on any Written copies of bills may be served in certain cases upon plaintiff undertaking to file a printed copy in fourteen days.

15 & 16 Vict. c. 86, s. 6.

defendant thereto, and such service shall have the same effect as the service of a printed copy.

Cost of written bill.

(*i*) The costs of a written bill *bonâ fide* incurred will be allowed on application (see Ord. XL. 18; *Elt* v. *Burial Board of Islington*, 2 W. R. 584). A written bill having been filed, and an order made upon an undertaking by the defendant to stay proceedings, which precluded the plaintiff from filing a printed copy within the time prescribed, the Court, by consent, dispensed with the filing of a printed copy until further order, and ordered that the written copy should remain on the file in the meantime (*Lord Abingdon* v. *Thornhill*, 3 W. R. 615); and where an interim order had been made prior to the expiration of the fourteen days, and the suit was afterwards arranged, the printed bill was dispensed with, *Garland* v. *Riordan*, 33 Beav. 448.

When printed bill dispensed with.

Interrogatories may be filed on a written bill (*Lambert* v. *Lomas*, 9 Hare, App. xxix.).

Injunction and ne exeat.

(*k*) As to injunctions, see Ord. XXV., *post*; and as to writs of *ne exeat*, see note to Ord. XXXIII., *post*.

When omission to file printed bill was unavoidable.

(*l*) See Ord. IX. 4, for the consequences of not filing the printed bill in fourteen days; but where the provision as to the printing of the bill within fourteen days was not complied with, by reason of the illness of the plaintiff's solicitor, the Court gave leave to file the printed bill upon payment of the costs of the motion (*Ferrand* v. *Corporation of Bradford*, 21 Beav. 422; 8 D. M. G. 93).

Printed copy filed nunc pro tunc.

And leave was given to file a printed copy, *nunc pro tunc*, where the clerk to whom the filing of the printed copy had been entrusted had been compelled to leave town, and had forgotten it, so that the written copy had been taken off the file, *Moss* v. *Syers*, 11 W. R. 1047; but a motion of this kind ought not to be made *ex parte*, and as its effect is to take from the defendants a right given them by the orders, they have a right to appear, and must have their costs (*ibid.*); see, too, *Platt* v. *Halldare*, 15 W. R. 304.

Stamps, &c.

(*m*) A second stamp on the printed bill is not necessary (*Jones* v. *Batten*, 9 Hare, App. lvii., 2 D. M. G. 111). It seems, however, that the fee for perusal (see Regulations as to Fees, Appendix, p. xxxix, *post*) must be paid to the defendant's solicitor on the filing both of the printed and written copy (*Trustees of the Birkenhead Dock* v. *The Chester and Shrewsbury Railway Company*, 22 L. J. Ch. 22).

Plaintiff to deliver printed copies of bill or claim at rate prescribed by Lord Chancellor.

VII. The plaintiff in any suit to be commenced in the said court after the time hereinafter appointed for the commencement of this Act shall be bound to deliver to the defendant or his solicitor, upon application for the same, such a number of printed copies of his bill of complaint or claim as he shall have occasion for, upon being paid for the same at such rate as shall be prescribed by any general order of the Lord Chancellor in that behalf (*n*).

Printed copies.

(*n*) See Ord. XL. 19, IX. 5, which provide that the payment to be made is at the rate of one halfpenny a folio, and that no defendant is to be entitled to demand more than ten printed copies.

Provisions as to filing, &c., prints of original bill extended to amendments.

VIII. Upon the amendment of any bill of complaint or claim to be filed in the said court after the time hereinafter appointed for the commencement of this Act, the provisions hereinbefore contained with respect to filing and serving and delivering printed copies thereof shall so

far as may be, extend and be applicable to the bill or claim as amended (*o*): Provided that where, according to the present practice of the said court, an amendment of a bill or claim may be made without a new engrossment thereof or under such other circumstances as shall be prescribed by any general order of the Lord Chancellor in that behalf, a bill or claim may be wholly or partially amended by written alterations in the printed bill of complaint or claim so to be filed as aforesaid (*p*).

15 & 16 Vict. c. 86, s. 8.

In certain cases a printed bill may be wholly or partially amended.

(*o*) As to the necessity of an endorsement requiring appearance on an amended bill, see *Barry* v. *Croskey* (2), 2 J. & H. 130; cited note (*e*), *ante*, p. 162. As to amendments generally, see Daniell, 366, and Ord. IX. 8—24; and notes to sect. 53, p. 217, *post*.

Endorsement on amended bill.

Amendments.

(*p*) As to necessity of reprinting, see Ord. IX. 18, and note.

Reprinting.

IX. It shall be lawful for the Lord Chancellor from time to time to make any order or orders directing that the provisions hereinbefore contained as to printing or otherwise shall be discontinued or suspended until further order, and to direct that all or any of the present practice as to the filing of bills and claims, and the issuing and service of subpœnas and writs of summons, may be revived and come into operation as if this Act had not passed.

Power to Lord Chancellor to revive the present practice as to filing of bills, &c.

X. Every bill of complaint to be filed in the said court after the time hereinafter appointed for the commencement of this Act, shall contain as concisely as may be a narrative of the material facts, matters, and circumstances on which the plaintiff relies, such narrative being divided into paragraphs numbered consecutively, and each paragraph containing, as nearly as may be, a separate and distinct statement or allegation (*q*), and shall pray specifically for the relief which the plaintiff may conceive himself entitled to, and also for general relief (*r*); but such bill of complaint shall not contain any interrogatories for the examination of the defendant.

Bills of complaint to contain concise narratives of material facts, &c., divided into numbered paragraphs, but not to contain interrogatories.

(*q*) As to the substance of a bill, see Mitf. Plead., p. 39, *et seqq*. As to the form, see schedule A., Appendix, p. 1, *post*.

Bill of complaint.

(*r*) This prayer should be omitted, where the bill is for discovery only, see note (*b*), Appendix, p. iii., *post*.

Prayer.

XI. Before the name of any person shall be used in any

Person whose

15 & 16 Vict. c. 86, s. 11.

suit (*s*) to be instituted in the said court as next friend (*t*) of any infant, married woman, or other party, or as a relator in any information (*u*), such person shall sign a written authority to the solicitor for that purpose, and such authority shall be filed with the bill, information, or claim (*v*).

name is used as next friend of any infant, &c., in any suit, &c., to sign a written authority.

(*s*) The section does not, it seems, apply to a petition (*Re Cartwright's Trusts*, 8 W. R. 492).

Costs of next friend.

(*t*) The object of appointing a next friend (at least in the case of a married woman) is to secure a responsible person for payment of the costs of the suit (see Mitf. Plead., pp. 26 and 29; *Bligh* v. *Tredgett*, 5 De G. & S. 74, where before the Act a next friend appointed without his own knowledge was held liable for costs). The next friend of an infant will *primâ facie* be held entitled to his costs, but the Court will look to his motives in instituting the suit, and if it finds that they were improper will refuse them to him (*Clayton* v. *Clarke*, 9 W. R. 718, L.J., overruling s. c. 2 Giff. 575).

As to appointment of next friends in chambers, see note (*f*), p. 147, and compare the cases cited in note to Ord. VII. 3, as to guardians *ad litem* of infant defendants.

Security for costs from next friend,

Security for costs is required from the next friends of married women, but not from the next friends of infants, *Hind* v. *Whitmore*, 2 K. & J. 458; *Pennington* v. *Alvin*, 1 S. & S. 265; for the following reasons:—

(1) of infant is *not* required;

(1) In the case of infants the Court is always anxious that questions in which they are concerned should be brought under its notice, and it has a jurisdiction over suits by infants to stay them if improper; and therefore it allows any person to file a bill in the name of an infant, and does not require security for costs from an infant's next friend either original or substituted on the ground of poverty, *Fellows* v. *Barratt*, 1 Keen, 119; *Murrell* v. *Clapham*, 8 Sim. 74.

(2) of married woman *is* required;

(2) In the case of a married woman the Court has no jurisdiction to stay the suit; and, therefore, to prevent improper suits, she must choose a substantial person for her next friend (*Wilton* v. *Hill*, 2 D. M. G. 807), even though the husband be a co-plaintiff (*Smith* v. *Etches*, 1 H. & M. 711); and the Court will remove him, or order security for costs to be given on evidence of his poverty, *Elliott* v. *Ince*, 7 D. M. G. 475 (see further, Morg. & Dav. Costs, 8, 248—263).

Or they may sue in formâ pauperis.

And this rule works little injustice to married women, for they may obtain leave to sue *in formâ pauperis* (see Ord. VII. 8); but where the married woman is not a pauper, she cannot obtain leave to sue without a next friend, *Caldicott* v. *Baker*, 13 W. R. 449; and see *Sealey* v. *Gaston*, *ibid.* 577.

Relator.

(*u*) The written authority of a relator was dispensed with where dispatch was of importance, *Attorney-General* v. *Murray*, 13 W. R. 65.

Bill filed without consent.

(*v*) For the practice where a bill is filed in the name of a married woman without her consent, see *Davies* v. *Whitehead*, 1 W. N. (1866), 162. And generally as to a plaintiff moving to take a bill filed without his authority off the file, see note to Ord. IX. 1; and as to where a bill is filed in the name of an infant without authority, see *Towsey* v. *Groves*, 11 W. R. 252; *Williams* v. *Williams* (which was a County Court appeal), 2 W. N. (1867), 205.

Interrogatories to be filed in record office by plaintiff within time prescribed.

XII. Within a time to be limited by a general order of the Lord Chancellor in that behalf (*w*), the plaintiff in any suit in the said court commenced by bill may, if he requires an answer from any defendant thereto, file in the record office of the said court interrogatories (*x*) for the

examination of the defendant or defendants, or such of them from whom he shall require an answer (*y*), and deliver (*z*) to the defendant or defendants so required to answer, or to his or their solicitor, a copy of such interrogatories, or of such of them as shall be applicable to the particular defendant or defendants; and no defendant shall be called upon or required to put in any answer to a bill unless interrogatories shall have been so filed, and a copy thereof delivered to him or his solicitor, within the time so to be limited, or within such further time as the Court shall think fit to direct. 15 & 16 Vict. c. 86, s. 12.

(*w*) The time is eight days from the time limited for the defendant's appearance, Ord. XI. 2; and until the time for filing interrogatories expires a defendant may not put in a demurrer to part of a bill without answering the rest, though no interrogatories have been filed, and it is doubtful whether he may in such a case put in a demurrer to part, and a voluntary answer as to the rest, *Rowe* v. *Tonkin*, 1 L. R. Eq. 9; but after the time for filing interrogatories has expired, if none have been filed the defendant may demur to part without answering the rest, *Burton* v. *Robertson*, 1 J. & H. 38. Time for filing interrogatories. Till it expires defendant must not put in anything but a *full* answer, demurrer, &c.

It is not irregular to put in a full voluntary answer before interrogatories have been filed, *Anderson* v. *Stamp*, 34 L. J. Ch. 230.

(*x*) For form of interrogatories, see Sched. B. Appendix, p. iii., *post*. An interrogatory may embrace several questions, and where some questions were sufficiently, and the remaining one was insufficiently, answered, an exception to the whole interrogatory was held wrong form (*Higginson* v. *Blockley*, 1 Jur. N. S. 1104; but see *Hambrook* v. *Smith*, 17 Sim. 209). Interrogatories how far to be founded on bill.

Under the new practice, the interrogatories are not required to be, as formerly (see *Muckleston* v. *Brown*, 6 Ves. 52), a literal echo of the bill. Thus it was held unnecessary in every case to insert a charge of documents in a bill as the foundation of the usual interrogatory respecting them (*Perry* v. *Turpin*, Kay, App. xlix.; *Kidger* v. *Worswick*, 5 Jur. N. S. 37; but see the modern practice in note (*l*) to sect. 18, p. 172, *post*). Nor is it now necessary that every interrogatory should be founded on a distinct allegation in the bill, unless the nature of the case requires it, *Marsh* v. *Keith*, 1 Drew. & S. 342; and see *Hudson* v. *Grenfell*, 3 Giff. 388, where a defendant having delayed answering interrogatories on the ground that they were unsupported by any corresponding statements in the bill, and were copied from interrogatories in an action at law which the defendant had answered, and to which he craved leave to refer, exceptions were allowed with costs.

Interrogatories may be filed on a written bill (*Lambert* v. *Lomas*, 9 Hare, App. xxix.). Interrogatories to written bill.

They may also be filed against a party made defendant by order of revivor (*Anon.*, 25 L. T. 61). Against party by revivor.

A plaintiff may file interrogatories to an amended bill, but after amending, he must, in the absence of special circumstances, confine his interrogatories to the amendments (*Official Liquidators of Southampton Steamboat Company* v. *Rawlins*, 12 W. R. 285). If he desires to interrogate after amendment as to any part of the original bill, he must obtain the leave of the Court (*ibid.*); therefore, where a plaintiff, having allowed the time for filing interrogatories upon the original bill to elapse, amended the bill merely by adding a co-plaintiff, and then without leave filed interrogatories upon the whole bill, it was held that the defendant was entitled to have these interrogatories taken off the file (*ibid.*); and see *Drake* v. *Symes*, 2 D. F. J. 81, and note to Ord. IX. 8, *post*. To amended bill. Confined to amendments.

(*y*) The costs of an answer vexatiously required, *e. g.* when a judgment creditor Costs of second answer.

15 & 16 Vict. c. 86, s. 12.

is interrogated on an amended bill as to the claims of other incumbrancers, must be paid by the plaintiff if the defendant takes the objection by his answer, *Cocks* v. *Stanley*, 4 Jur. N. S. 492; *Drake* v. *Symes*, l. c.

(*z*) As to delivery, see note to Ord. XI. 4.

When defendant absconds.

A bill may be taken *pro confesso* against an absconding defendant, although interrogatories have not been *delivered*, see note (*g*) to Ord. XXII. 2.

Defendants may answer without leave within the time now allowed, though not required so to do by plaintiff; but after that time defendant must have leave.

XIII. Whether the plaintiff in any suit in the said court commenced by bill does or does not require any answer from the defendant or any one or more of the defendants to the bill, such defendant or defendants may, without any leave of the Court, put in a plea, answer (*a*), or demurrer to the plaintiff's bill, within the time now allowed to the defendant for demurring alone to a bill, or within such other time as shall be fixed by any general order of the Lord Chancellor in that behalf; but after that time a defendant or defendants not required to answer the plaintiff's bill, shall not be at liberty to put in a plea, answer, or demurrer to the bill, without leave of the Court: Provided that the power of the Court to grant further time for pleading, answering, or demurring to any bill, upon the application of any defendant or defendants thereto, whether required to answer the bill or not, shall remain in full force, and shall not be in any wise prejudiced or affected (*b*): Provided also, that if the Court shall grant any further time to any defendant for pleading, answering, or demurring to the bill, the plaintiff's right to move for a decree under the provisions hereinafter contained, shall in the mean time be suspended.

Voluntary answer sufficient.

(*a*) A voluntary answer is treated as at once sufficient, *Rogers* v. *Fryer*, 2 W. R. 67.

Defendant not answering traverses plaintiff's case.

If the defendant is not required to answer, and does not answer, he is considered as traversing the plaintiff's case (sect. 26, *infra*).

But he should *plead* Statute of Frauds, &c.

But defences in respect of subsequent matter, *e.g.* the Statute of Limitations or of Frauds ought to be specially pleaded; and a defendant who is not required to answer should not trust to merely traversing the bill by abstaining from answering, for the defence of the statute may not be allowed to be pleaded at the bar, *Holding* v. *Barton*, 1 Sm. & G. App. xxv.; but see *Lincoln* v. *Wright*, 4 De G. & J. 16.

Such defendant may, however, raise these defences by affidavit (*Green* v. *Snead*, 30 Beav. 231, and cases cited in reporter's note), but not where he has answered, and not raised them by answer, *Phillips* v. *Phillips*, 3 Giff. 200.

(*b*) See Ord. XXXVII. 8, 17.

Defendant's answer may contain not only answer to interrogatories,

XIV. The answer of the defendant to any bill of complaint in the said court may contain, not only the answer of the defendant to the interrogatories so filed as aforesaid,

but such statements material to the case as the defendant may think it necessary or advisable to set forth therein, and such answer shall also be divided into paragraphs numbered consecutively, each paragraph containing as nearly as may be a separate and distinct statement or allegation (*c*).

15 & 16 Vict. c. 86, s. 14.

but statements material to his case.

(*c*) See Ord. XV. 1.

XV. (*d*) The plaintiff in any suit commenced by bill shall be at liberty at any time after the time allowed to the defendant for answering the same shall have expired (but before replication) (*e*) to move the Court, upon such notice as shall in that behalf be prescribed by any general order of the Lord Chancellor (*f*), or such decree or decretal order as he may think himself entitled to (*g*), and the plaintiff and defendant respectively shall be at liberty to file affidavits (*h*) in support of and in opposition to the motion so to be made, and to use the same on the hearing of such motion: and if such motion shall be made after an answer filed in the cause, the answer (*i*) shall, for the purposes of the motion be treated as an affidavit.

Plaintiff may on expiration of time for answering, but before replication, move for a decree or decretal order.

Affidavits may be filed.

(*d*) For the practice as to service of notice of motion for decree, time of filing affidavits, &c. see Ord. XXXIII. 4—9.

Motion for decree.

This section is retrospective, *Cousins* v. *Vasey*, 9 Hare, App. xxxi.

(*e*) Where replication had been filed under the old practice, and a new defendant had been added, after the statute came into operation, V.-C. Wood held that, as against such new defendant, the cause might be heard on motion for decree, *Gwyon* v. *Gwyon*, 1 K. & J. 211.

Replication unnecessary on motion for decree.

Replication is unnecessary in a cause where notice of motion for decree is given, *Duffield* v. *Sturgis*, 9 Hare, App. lxxxvii.

Nor is a traversing note necessary except where a defendant has been required to answer, and has not done so, *Heath* v. *Lewis*, 17 Jur. 1090; but it was not considered an obstacle to the cause coming on upon motion for decree that a traversing note had been filed, *Maniere* v. *Leicester*, 5 D. M. G. 75; *Jones* v. *Howell*, 3 W. R. 559.

Traversing note, when necessary.

(*f*) The time prescribed is one month (Ord. XXXIII. 4). Notice of motion at one month's date having thus been given, and a list of the plaintiff's affidavits furnished (Ord. XXXIII. 5, *post*), the defendant's affidavits in answer, and the plaintiff's affidavits in reply must be filed, and the *motion* thereupon *set down* within the times limited by Ord. XXXIII. 6—9, Ord. of Nov. 1866, r. 2. See note (*k*) to Ord. XXXIII. 9, *post*.

Setting down motion for decree.

(*g*) A plaintiff moving for a decree, according to the prayer of the bill, may have the same relief which he could have had at the hearing of a cause in the ordinary way (*Norton* v. *Steinkopf*, Kay, 45, and *ibid.*, App. x.); but as to the distinction between decrees made on motion for decree and decrees made at the hearing of the cause, see note (*g*), p. 139 (*ante*), and note (*b*) to 30 & 31 Vict. c. 64, *post*.

Decree made on motion for decree.

(*h*) In causes where notice of motion for decree is given, the evidence is

15 & 16 Vict. c. 86, s. 15.

generally taken on both sides by affidavit; and see Ord. XXXIII. 5, 6, 7, for the time limited for filing affidavits.

The exceptions to the general rule are—

EVIDENCE ON MOTION FOR DECREE.

By affidavit. Except,

(1) evidence at hearing under sect. 39;

(1) The Court has jurisdiction under sect. 39, *infra*, on a motion for a decree to issue a *subpœna ad testificandum*, or a *subpœna duces tecum*, see Appendix, p. vii. *post*, requiring the attendance of witnesses for oral cross-examination, *Wigan* v. *Rowland*, 10 Hare, App. xviii.; *Wilhelm* v. *Reynolds*, 8 W. R. 625, V.-C. K.; *Woodbourn* v. *Grant*, 22 Beav. 487, where it was held that documents might be proved at the hearing as exhibits on a motion for a decree; see, too, *Raworth* v. *Parker*, 2 K. & J. 163, where the Court intimated that, on a motion for a decree, the hearing might be ordered to stand over, in order to prove a deed in that way.

So the Court may receive proof by affidavit at the hearing of matters not directly at issue, see sect. 28 of Sir G. Turner's Act, *ante*, p. 130, and note.

(2) examination of unwilling witness before examiner;

(2) It is now settled that a party may summon his own unwilling witness for examination before the examiner; but not before notice of motion for decree is served, *Rendle* v. *Metropolitan Bank*, 15 W. R. 1066, and see *Coles* v. *Morris* (on appeal), 2 W. N. (1867), 237. Such witness, however, must be examined in the presence of the other side, and cross-examined and re-examined then and there, the rule as to *ex parte* depositions only extending to causes where issue is joined (see note (*u*) to sect. 31, p. 184, *post*), *Bodger* v. *Bodger*, 11 W. R. 80; *Smith* v. *Baker*, 2 H. & M. 498; *Coles* v. *Morris*, 15 W. R. 828; *Pellatt* v. *Nichols*, 24 Beav. 298; *Rehden* v. *Wesley*, 26 Beav. 432.

(3) cross-examination before examiner.

(3) As to cross-examination before an examiner on affidavits in causes where notice of motion for decree is given, see sects. 31 and 38, pp. 184, 190, *post*; and as to the mode of requiring a witness's attendance before the examiner, see sect. 40 and note (*s*), p. 193, *post*. A defendant may in such causes be cross-examined on his answer, see note (*u*), p. 194, *post*.

Notice to read answer.

(*i*) It is not necessary for the plaintiff to give a defendant notice of his intention to read the latter's answer against him (*Cousins* v. *Vasey*, 9 Hare, App. lxi.). But a defendant should give notice of his intention to read his own answer.

Against whom and when an answer may be read with or without notice.

A question has arisen as to how far one defendant's answer may be read against his co-defendant on a motion for decree. In *Cousins* v. *Vasey*, l. c., V.-C. Wood, after consulting with the other judges, seemed to be of opinion that upon special notice of the intention to use them being given to the parties against whom they were to be read, the answer of one defendant might be read against his co-defendants. But in the later case of *Truck* v. *Lamprell*, 3 W. R. 193, M. R. (and comp. *Rehden* v. *Wesley*, 26 Beav. 432), the Court appears to have been of a contrary opinion. This case is, however, very succinctly reported; and in the later case of *Ashmall* v. *Wood*, 3 Jur. N. S. 232, V.-C. Stuart thought that the answer of a deceased defendant might be read against his co-defendants before the chief clerk, observing that "the reason why under the old practice the answer of one defendant could not be read against another co-defendant was, not only that no issue was joined between them, but that as one defendant was not allowed to have even an office-copy of the answer of the other defendant, there would be the greatest risk of injustice and miscarriage by using any statement, although on oath, under such circumstances as evidence in the cause." The inconvenience here referred to could not of course occur in cases *where notice was given*. It seems, therefore, that both principle and authority are in favour of the practice as laid down in *Cousins* v. *Vasey*.

Since the above cases were determined, V.-C. Kindersley, after consultation with the Registrars, has decided in *Stephens* v. *Heathcote*, 1 Dr. & Sm. 138—

1. That a plaintiff *may* read a defendant's answer against that defendant *without notice* (see *Dawkins* v. *Mortan*, 1 J. & H. 339).
2. That a plaintiff may *not* read one defendant's answer against his co-defendant *without notice*.
3. That a defendant may *not* read his own answer against the plaintiff *without notice*.
4. That if the plaintiff reads one part of a defendant's answer against that defendant, such defendant, *notwithstanding that no notice has*

15 & 16 Vict. c. 86, s. 15.

been given, is at liberty to read the rest of his answer against the plaintiff. (It will be seen that this decision, in substance, agrees with the statement of the practice given above. *Quære.* Can a defendant read his co-defendant's answer against the plaintiff? It seems that he *can, but only on notice.* See *Lord* v. *Colvin*, 3 Drew. 222; and *Rushout* v. *Turner*, cited in 8 W. R. 337.)

As the plaintiff can read the defendant's answer without notice, he may always enter it as read in the decree (*Bright* v. *Legerton*, 29 Beav. 69). As to the effect of giving notice of an intention to read the defendant's answer, see *Wright* v. *Edwards*, 2 W. R. 193.

Answer of person made party only for discovery.

As to reading the answer of a defendant made a party, as the officer of a corporation, also defendants, see *M'Intosh* v. *Great Western Railway Company*, 4 De G. & Sm. 544.

Answer of married woman.

Where husband and wife answer jointly, instead of the wife answering separately, her admissions may, nevertheless, be read against her, with reference to her separate estate (*Clive* v. *Carew*, 1 J. & H. 207; see *Callow* v. *Howle*, 1 De G. & Sm. 531).

In a cause where issue is joined, an answer is, of course, not evidence until turned into an exhibit.

Court may refuse or grant such motion, or make order for further prosecution, &c.

XVI. Upon any such motion for a decree or decretal order it shall be discretionary with the Court to grant or refuse the motion (*j*), or to make an order giving such directions for or with respect to the further prosecution of the suit as the circumstances of the case may require, and to make such order as to costs as it may think right.

What order may be made on motion for decree.

(*j*) The Court may either dismiss the bill, or allow it to be amended (see p. 217, *post*; *Thomas* v. *Bernard*, 7 W. R. 86; and see *Warde* v. *Dickson*, 5 Jur. N. S. 698).

As to the decree made on motion for decree, see note (*g*), last page.

Practice of excepting to bills, answers, &c., for impertinence abolished.

Proviso as to costs.

XVII. The practice of excepting to bills, answers, and other proceedings in the said court for impertinence shall be and the same is hereby abolished: Provided always, that it shall be lawful for the Court to direct the costs occasioned by any impertinent matter introduced into any proceeding in the said court to be paid by the party introducing the same, upon application being made to the Court for that purpose (*k*).

(*k*) See Ord. XLII. *post.*

Court or judge may order defendant to produce documents, &c., on oath.

XVIII. It shall be lawful for the Court upon the application (*l*) of the plaintiff (*m*) in any suit in the said court, whether commenced by bill or by claim, and as to a suit commenced by bill, whether the defendant (*n*) may or may not have been required to answer the bill, or may or may not have been interrogated as to the possession of documents, to make an order for the production by any defendant upon oath (*o*) of such of the documents in his possession or power (*p*) relating to matters in question in the suit (*q*), as

15 & 16 Vict. c. 86, s. 18.

the Court shall think right (*r*); and the Court may deal with such documents, when produced, in such manner as shall appear just (*s*).

Production of documents how applied for.

(*l*) The course of procedure as to applications for production of documents is the same after the hearing as before it, Ord. XLII. 4; see *Hanslip* v. *Kitton*, 1 D. J. S. 440.

The Common Law Procedure Act, 1854, under which production of documents can be obtained by summons, does not interfere with the equitable jurisdiction, *Makepeace* v. *Rogers*, 5 N. R. 499; see *Barry* v. *Croskey*, 2 J. & H. 30; *Peacock* v. *Lowe*, 2 W. N. (1867), 212 (Probate Court).

By summons in chambers and interrogatory as to documents now unnecessary.

The application for the affidavit as to documents is made by summons in chambers, see p. 146, *ante;* a defendant may decline to answer an interrogatory as to documents, if he expresses his readiness to make the usual affidavit, *Perry* v. *Turpin*, Kay, App. xlix.; *Barnard* v. *Hunter*, 4 W. R. 34; *Piffard* v. *Beeby*, 1 L. R. Eq. 623; but see note (*p*), *infra*.

The plaintiff may apply at any period of the suit, and need not make any affidavit in support of his application, *Rochdale Company* v. *King*, 15 Beav. 11; see *Parkinson* v. *Chambers*, 1 K. & J. 72.

As to applications by defendants, see sect. 19, p. 177, *infra*.

Who may apply for production.

(*m*) Persons not originally parties to the suit, but who will be bound by the decree, may apply under this or the 20th sect., *Dent* v. *Dent*, 1 L. R. Eq. 186; 35 Beav. 126. And after a decree for administration, any creditor may apply for production of documents relating to his claim, *Re M'Veagh*, 1 D. J. S. 399; see *Forbes* v. *Tanner*, 11 W. R. 414; *Macrae* v. *Smith*, 2 K. & J. 412; and the rule applies conversely to make such persons liable to be ordered to produce documents, Daniell, 1665. An arbitration which has been made a rule of Court, is not such a proceeding that the parties to it can take out a summons for production of documents, *Re Anglo-Austrian Bank*, 10 L. T. N. S. 369.

Where production sought from company.

(*n*) Where discovery as to documents is sought from a company or corporation, the secretary or officer of the company should be made a defendant for the purpose, *Ranger* v. *Great Western Railway Company*, 4 De G. & J. 74; see *Law* v. *London Indisputable Policy Company*, 10 Hare, App. xx.; *Attorney-General* v. *East Dereham Corn Exchange Company*, 5 W. R. 486; and compare note (*w*) on sect. 19, *infra;* *Chaffers* v. *Woolmer*, 30 L. T. 126. Where the clerk of a company stated in his affidavit that all the documents were in the possession of the warden, and that he could not inspect them without the warden's permission, it was held that the affidavit was insufficient, *Attorney-General* v. *Mercers' Company*, 9 W. R. 83; see note (*q*), *infra*, under "third party's interest." A secretary made a party for discovery cannot evade discovery by resigning his situation after the filing of the bill, *Acomb* v. *Landed Estates Company*, 14 W. R. 86; and see *Carew* v. *Davis*, 21 Beav. 213. Under a winding-up, in a contest between the company and an alleged contributory, the official liquidator is in the same position as if on a bill filed against the company, he had been made a defendant for purposes of discovery, *Re Barned's Banking Company*, 2 L. R. Ch. 350.

Production where ordered.

At place of business.

(*o*) The documents are to be deposited at the Record and Writ Office, Ord. XLII. 3, but the Court will allow production at the defendant's place of business, if he states that the documents are in constant and necessary use in his business, *Grane* v. *Cooper*, 4 M. & C. 263; see *Mertens* v. *Haigh*, Johns, 735; but it is not sufficient, to show that the books, &c. are in constant use, without also stating that they cannot be removed without inconvenience, *Hooper* v. *Gumm*, 2 J. & H. 602. And production is frequently ordered at the office of the solicitor of the party ordered to produce, see *Groves* v. *Groves*, 2 W. R. 86; Daniell, 1677. In such case the solicitor may not charge the party inspecting for attendances, *Flockton* v. *Peake*, 12 W. R. 1023, nor for copies, except at stationer's charges, note (*e*) to Ord. XXXVI. 13, *post*.

If the defendant is required to produce or obtain information as to deeds,

&c., not in his possession, he is entitled to have the costs of so doing first tendered to him, *Bethell* v. *Casson*, 12 W. R. 200. 15 & 16 Vict. c. 86, s. 18.

A plaintiff who obtains the common order for production, may inspect documents which are ordinarily produced only on payment of customary fees, (*e.g.* court rolls) without payment of such fees, *Hoare* v. *Wilson*, 4 L. R. Eq. 1. Expense of producing or getting information.

The common undertaking to produce "to the plaintiff," means "to the plaintiff, his solicitors, and agents," unless that be guarded against by the terms of the undertaking, *Williams* v. *Prince of Wales Assurance Company*, 23 Beav. 338 ; but it does not authorise inspection by a non-professional relation of the plaintiff, though alleged to be the only person acquainted with the accounts to be inspected, *Summerfield* v. *Pritchard*, 17 Beav. 9. The plaintiff's agent, for purposes of inspection, ought, it seems, to be a *legal* agent, or at least a general agent, and not one appointed for the special purpose, *Draper* v. *Manchester, &c. Railway Company*, 3 D. F. J. 23. Production to agents or accountants.

But on a special application, and on a special case being made out for it, an accountant may be allowed to inspect documents, *Bonnardet* v. *Taylor*, 1 J. & H. 383 ; but not an accountant who has any personal interest in the case, *Draper* v. *Manchester, &c. Railway* (l. c.). Thus in *Re Joint Stock Discount Company*, 15 W. R. 99, an accountant was allowed to inspect the books of a company in course of being wound up on behalf of the shareholders on certain conditions ; and where the issue in a cause depended in a great measure upon the state of the originals of certain engineering plans and documents, and the defendant deposed that he was not possessed of any engineering knowledge, and that the inspection of the documents would be useless to him without the aid and assistance of an engineer, the order for production and inspection was directed to extend to the defendant's surveyor, *Swansea Vale Railway Company* v. *Budd*, 2 L. R. Eq. 274. Other scientific persons.

Under a decree in an administration suit, a creditor supported his claim in chambers by the production of certain documents. The plaintiff, believing these documents to be forged, applied to have them deposited with the chief clerk, and for liberty to have them produced to be examined by scientific persons to test their genuineness, and the application was granted, the creditor's solicitor being allowed to be present at such examination (*Groves* v. *Groves*, Kay, App. xix., marginal note).

The common order for production does not authorise inspection by a co-defendant, *Bartley* v. *Bartley*, 1 Dr. 233 ; but it is immaterial that the party inspecting is a witness in the cause, if the question is merely as to the contents of the documents, *Swansea Vale Railway Company* v. *Budd* (*ubi sup.*) ; *secus*, where the question was whether the documents were forged, *Groves* v. *Groves* (l. c.). Not to co-defendants.

No lien for costs attaches, even in favour of the next friend of an infant plaintiff, who has repudiated the suit, upon any deed brought in merely to enable the plaintiff to obtain inspection for the purposes of discovery (*Dunn* v. *Dunn*, 3 Drew. 17 ; 7 D. M. G. 635). As soon, therefore, as the purposes of discovery are answered, they will be ordered to be re-delivered to the producing party (*ibid.*). No lien for costs on deeds produced.

(*p*) The defendant must make the affidavit, though he insists that he cannot be compelled to produce any documents, for the question of liability to production is distinct from the question of sufficiency of affidavit, *Rumbold* v. *Forteath*, 3 K. & J. 44 ; *Lazarus* v. *Mozley*, 5 Jur. N. S. 1119 ; *Nicholl* v. *Jones*, 13 W. R. 451 ; see too as to the necessity of making the affidavit, *Manby* v. *Bewicke*, 27 L. T. 55 ; *Quin* v. *Ratcliffe*, 9 W. R. 65 ; *Hanslip* v. *Kitton*, 1 D. J. S. 440. Affidavit *must* be made.

The order is in the form that the plaintiff, his solicitor or agent, may be at liberty to inspect and peruse such documents admitted by the defendant as he may not by his affidavit object to produce, and to take copies thereof and extracts therefrom as he shall be advised at his own expense, Seton, 1040 ; *Mertens* v. *Haigh*, Johnson, 738 ; and as to the cost of copies when furnished by the other side, see Ord. XXXVI. 3. Order is to produce documents admitted by affidavit.

The form of the affidavit is settled by schedule 3 to the Regulations of Aug. 8, 1857 (App. p. lix. *post*), and ought not to be varied except to meet the special Form of affidavit.

15 & 16 Vict. c. 86, s. 18.

circumstances of the case (*Woodhatch* v. *Freeland*, 11 W. R. 398; *Newall* v. *Telegraph Company*, 2 L. R. Eq. 756).

No cross-examination on it.

There can be no cross-examination on the affidavit as to documents, *Manby* v. *Bewicke*, 8 D. M. G. 470; *Newall* v. *Telegraph Company* (l. c.); nor can counter affidavits be filed, *Westminster, &c. Company* v. *Clayton*, 12 W. R. 123; except as to irrelevant matter introduced into the affidavit, *Underwood* v. *Secretary for India*, 14 W. R. 551; see *Lamb* v. *Orton*, 1 Drew. 414; *Wing* v. *Harvey*, 1 Sm. & G. App. x.

Remedy where *affidavit insufficient* (*a*) in point of distinctness;

If the affidavit is insufficient in the sense of not giving a full and distinct description of the documents admitted (see *Rumbold* v. *Forteath*, 3 K. & J. 44), the remedy is to take out a summons to consider the sufficiency, *Lazarus* v. *Mosely*, 5 Jur. N. S. 1110; but Ord. XVI. 19, that after a third insufficient answer a defendant shall stand committed does not apply to a third insufficient affidavit, *Harford* v. *Lloyd*, 2 W. R. 537.

(*b*) by omitting relevant documents;

If the affidavit is inconsistent with the answer, or a suspicion exists that documents relating to the matters in issue are omitted, or that the defendant is claiming to protect documents which he ought to produce, the remedy is to take out a further summons requiring the defendant to state whether he has a particular document or class of documents in his possession, *Westminster Brymbo, &c. Company* v. *Clayton*, 12 W. R. 123; *Noel* v. *Noel*, 1 D. J. S. 468, 11 W. R. 588, 791; *Caton* v. *Lewis*, 22 L. J. Ch. 946; *Bowes* v. *Fernie*, 3 M. & C. 632; or, as the case may be, requiring him to produce the documents which he improperly claims to protect, *Nicholl* v. *Jones*, 13 W. R. 451; *Lafone* v. *Falkland Islands Company*, 27 L. J. Ch. 25; *Greenwood* v. *Greenwood*, 6 W. R. 119.

As to the *subpœna* for production of documents before the examiner, see *post*, sect. 40, p. 193; and at the hearing, *Griffith* v. *Ricketts*, 7 Hare, 301.

(*c*) by the inquiry not having been definite.

If the affidavit is technically sufficient, but the plaintiff finds that the inquiry founded on the bill was not sufficiently pointed to enable him to obtain discovery as to specific matters, he may amend his bill and file interrogatories as to the specific matters on which he seeks discovery, and will then be entitled to a further affidavit as to documents; and a defendant applying for discovery under sect. 20, *infra*, may file a concise statement and interrogatories for the same purpose, *Newall* v. *Telegraph Company*, 2 L. R. Eq. 756; *Warden* v. *Peddington*, 32 Beav. 639.

In his *possession or power.*

(*q*) A party must produce relevant documents in the possession of his solicitor or agent, and cannot refuse because the solicitor says they are irrelevant, unless he himself has inspected them, *M'Intosh* v. *Great Western Railway Company*, 4 D. M. G. 544; *Manby* v. *Bewicke* (3), 8 D. M. G. 476; nor can the solicitor refuse, because he claims his ordinary lien, *Lockett* v. *Carey*, 10 Jur. N. S. 144; *Hope* v. *Liddell*, 7 D. M. G. 331; *Re Cameron's Coalbrook Railway Company*, 25 Beav. 1; but see *Re Gregson*, 26 Beav. 87; *North* v. *Huber*, 29 Beav. 437; and cases, *infra*, on documents in pawn. If they are the agent's private property they need not be produced, *Colyer* v. *Colyer*, 9 W. R. 452; but see *Bishop of Winchester* v. *Bowker*, *ibid.* 404.

Possession of solicitor or agent.

Documents abroad.

Where the documents ordered to be produced are in a foreign country, the party required to produce them must show not only that it would be difficult to obtain them, but that he has tried and failed, *Mertens* v. *Haigh*, 11 W. R. 792; and as to documents abroad, see *Freeman* v. *Fairlie*, 3 Mer. 44.

Where stranger to the suit has possession,

Documents in the possession of a stranger to the suit previously to its institution cannot be ordered to be produced in his absence, *Burbridge* v. *Robinson*, 2 M. & G. 244; and if such person has covenanted to produce the documents for the maintenance and justification of the title of a party to the suit, he cannot be ordered to produce them in a suit hostile to such party, *Bethell* v. *Casson*, 1 H. & M. 806; but full information must be given as to the nature of such documents (see *infra*).

or joint interest.

Similarly, where a person, not a party to the suit, has a joint interest in the documents (*Edmonds* v. *Foley*, 30 Beav. 282; *Bayley* v. *Cass*, 10 W. R. 370; *Ford* v. *Dolphin*, 1 Dr. 222; *Lord Eglinton* v. *Lamb*, 14 W. R. 170), the documents will probably be protected, but full information must be given in the affidavit (see *infra*). Thus, directors of a company could not be ordered to produce documents in which other directors had joint interest, *Penney* v.

Goode, 1 Dr. 474; *Reid* v. *Langlois*, 1 M. & G. 627; *Lazarus* v. *Mozley*, 5 Jur. N. S. 1120. 15 & 16 Vict. c. 86, s. 18.

And even where the documents had been pawned before the institution of the suit, and the defendant was too poor to redeem them, *Liddell* v. *Norton*, Kay, App. xi.; see *Re Williams*, 7 Jur. N. S. 323; *North* v. *Huber*, 29 Beav. 437; but as to solicitor's lien, see *supra*. Documents in pawn.

But where a defendant had in his possession letters written to him by a person not party to the suit, which were admitted to be material, he was compelled to produce them, though they were marked "private and confidential," and though the sender objected to the production, *Hopkinson* v. *Lord Burleigh*, 2 L. R. Ch. App. 447, 15 W. R. 543, where Lord Cairns, L.J. said, "the sender of the letter must be supposed to have given an authority to the receiver to use it for every lawful purpose, and it has been held that publication is not such a lawful purpose. But if there can be one purpose more lawful than another, it would be to produce the latter in a court of justice for the furtherance of the ends of justice," see *Penkethman* v. *White*, 2 W. R. 380; *Lee* v. *Hammerton*, 12 W. R. 975, where the report of a medical officer of an insurance company being material, had to be produced, though confidential. An undertaking not to use the letters for any collateral purpose must be given in such a case, *Hopkinson* v. *Lord Burleigh* (l. c.); *Richardson* v. *Hastings*, 7 Beav. 354; and generally when the plaintiff obtains an order for production and inspection of documents, he does so upon an implied undertaking not to make public any information so obtained, or to communicate such information to persons not parties to the suit (*Williams* v. *The Prince of Wales Assurance Company*, 23 Beav. 338); and, it seems, the Court would grant an injunction to restrain him from so doing (*ibid.*). See, too, *Reynolds* v. *Godlee*, 4 K. & J. 88; and *Enthoven* v. *Cobb*, 5 De G. & Sm. 595; on appeal, 2 D. M. G. 632; *Bowen* v. *Pearson*, 11 W. R. 819. Third party's interest. Private letters.

Where a co-defendant has an interest in the document scheduled, he should be served with the summons to produce, *Gresley* v. *Mousley*, 2 K. & J. 288; even if the Court should hold that there are grounds for not ordering production of the documents on account of a third person's interest therein, still the party must give all the information in his power as to such documents as he has partial possession of, and make discovery of their contents so far as they are material, *Taylor* v. *Rundell*, Cr. & Ph. 104; *Bovill* v. *Cowan*, 15 W. R. 608; *Clinch* v. *Financial Corporation*, 2 L. R. Eq. 271. What information must be given as to protected documents.

And as to the expense of getting such information, see *Bethell* v. *Casson*, cited p. 173, *supra*.

(*r*) The general rules as to privilege (see Seton, 1055, 1061) are applicable to the protection of documents from discovery, *Cleyg* v. *Edmondson*, 22 Beav. 125, 137; *Rajah of Coorg* v. *East India Company*, 2 Jur. N. S. 407. What *documents* are *protected*.

A defendant is not compelled to produce :—

(1) Communications between him and his solicitor relating to the matter in litigation, though no dispute had arisen at the time they were written, *Ford* v. *De Pontes*, 7 W. R. 299; *Lawrence* v. *Campbell*, 4 Drew. 485; *Simpson* v. *Brown*, 33 Beav. 482; communications with a former solicitor, *Marriott* v. *Anchor, &c. Company*, 3 Giff. 304; but see *Patch* v. *Ward*, 1 L. R. Eq. 436. Thus counsel's drafts and briefs, and cases laid before them are protected, *Nicoll* v. *Jones*, 2 H. & M. 588; except so far as the indorsements, &c. thereon were matters *publici juris*, *Walsham* v. *Stainton*, 2 H. & M. 1. (1) Communications with professional advisers,

Communications with a solicitor out of the jurisdiction, *Lawrence* v. *Campbell*, 4 Drew. 485, or the solicitor's clerk, or an accountant or skilled person employed by the solicitor are within the principle, *Steele* v. *Stewart*, 1 Ph. 471; *Churton* v. *Frewin*, 2 Dr. & Sm. 390; *Hooper* v. *Gumm*, 10 W. R. 644. But whether the privilege extends to communications with such agent of the solicitor, not alleged to have been written in consequence of communications with the solicitor, is doubtful, *Hooper* v. *Gumm* (l. c.); but see *Jenkyns* v. *Bushby*, 2 L. R. Eq. 547; it does not extend to communications made to the solicitor but not in his character of solicitor, *Thomas* v. *Rawlings*, 27 Beav. 140; and see *Hampson* v. *Hampson*, 26 L. J. Ch. 612; nor to letters passing and their agents. Made for the purpose of the suit.

15 & 16 Vict. c. 86, s. 18.

between co-defendants, *Betts* v. *Menzies*, *ibid.* 528 ; nor to information which the solicitor has derived from collateral sources, not directly from the client, *Marsh* v. *Keith*, 1 Dr. & Sm. 342; *Ford* v. *Tennant*, 32 Beav. 162 ; *Re Land Credit Society*, 15 W. R. 703.

unless the client makes no objection;

The solicitor cannot object to produce if his client does not object, *Re Cameron's Coalbrook Railway Company*, 25 Beav. 1 (arbitrators, however, need not produce papers drawn up for their own guidance, *Ponsford* v. *Swayne*, 1 J. & H. 433).

or the communication was for the benefit of both parties;

Professional opinions given partly for the benefit of the party requiring production are not privileged, *Reynolds* v. *Godlee*, 4 K. & J. 88 ; *Talbot* v. *Marshfield*, 13 W. R. 885 ; *Wynne* v. *Humberston*, 27 Beav. 421 ; on appeal, 32 L. T. 306.

or fraud is charged ;

Where fraud is charged no privilege can be claimed for documents relating to the alleged fraud, *Phillips* v. *Holmer*, 15 W. R. 578 ; *Feaver* v. *Williams*, 11 Jur. N. S. 902 ; but see *Mornington* v. *Mornington*, 2 J. & H. 697 ; *Charlton* v. *Coombes*, 4 Giff. 372.

(2) tending to criminate.

(2) Documents tending to criminate are privileged, see *Waters* v. *Earl of Shaftesbury*, 14 W. R. 259 ; *Howes* v. *McKernan*, 30 Beav. 547 ; but it is not the practice to allow either of the statutes of Elizabeth to be an excuse for resisting discovery, *Bunn* v. *Bunn*, 12 W. R. 561.

(3) Irrelevant,

(3) Documents which manifestly have no bearing on the issue to be tried, or which relate exclusively to the defendant's own title, or to the evidence by which his case is to be established, need not be produced, *Daw* v. *Eley*, 2 H. & M. 725 ; *Ingilby* v. *Shafto*, 33 Beav. 31.

or relating only to other parties' title ;

Thus, where the issue raised was whether the defendant had agreed to pay the plaintiff a sixth of his profits, the plaintiff was not entitled to the production of the books and accounts of the defendant before the hearing, *Turney* v. *Bayley*, 12 W. R. 633 ; see *Mansel* v. *Feeny*, 2 J. & H. 323 ; so where in a patent suit an interrogatory *assumed* infringement, *De la Rue* v. *Dickinson*, 3 K. & J. 388 ; *Crossley* v. *Stewart*, 1 N. R. 426 ; *Forbes* v. *Tanner*, *ibid.* 464 ; *Kay* v. *Hargreaves*, 14 L. T. N. S. 281.

The party refusing production must show that the documents in question relate to his title and do not relate to the plaintiffs, *Clegg* v. *Edmondson*, 3 Jur. N. S. 299 ; *Lind* v. *Isle of Wight Ferry Company*, 8 W. R. 540 ; *Bishop of Winchester* v. *Bowker*, 29 Beav. 479 ; *Felkin* v. *Lord Herbert*, 9 W. R. 756 ; *Bolton* v. *Corporation of Liverpool*, 1 M. & K. 88 ; *Jenkyns* v. *Bushby*, 14 W. R. 531. Thus a purchaser without notice of a fee simple estate need not produce his title-deeds to the mortgagee of a term, *Hunt* v. *Elmes*, 27 Beav. 62. But a defendant cannot refuse production merely on the ground that if the plaintiff's claim is unfounded, he has no interest in them, *Gresly* v. *Mousley*, 2 K. & J. 288; and see *Rumbold* v. *Forteath*, 3 K. & J. 44 ; *Ferrier* v. *Atwool*, 14 W. R. 597 ; *Bugden* v. *South*, 26 L. J. Ch. 425 ; *Bates* v. *Master of Christ's College, Cambridge*, *ibid.* 449 ; *Quin* v. *Ratcliff*, 9 W. R. 65 ; but see *Robson* v. *Flight*, 33 Beav. 268. Production of the court rolls of a manor was ordered in a suit to establish a custom, *Warwick* v. *Queen's College*, 3 L. R. Eq. 683.

Mortgagee's title deeds ;

If a mortgagee denies the title of a mortgagor claiming to redeem he must produce the mortgage deed, *Patch* v. *Ward*, 1 L. R. Eq. 436 ; *Jones* v. *Jones*, Kay, App. vi. : *Bridgewater* v. *De Winton*, 12 W. R. 40 ; *secus*, where he submits to be redeemed, *Howard* v. *Robinson*, 4 Drew. 526 ; *Weeks* v. *Stourton*, 13 W. R. 489 ; see *Freeman* v. *Butler*, 33 Beav. 289 ; *Smith* v. *Barnes*, 1 L. R. Eq. 65.

(4) Relating to other party's mode of conducting his case.

(4) Nor need a party produce documents relating only to his mode of conducting his case, *Ingilby* v. *Shafto*, 33 Beav. 31 ; *Gandee* v. *Stansfield*, 4 De G. & J. 1 ; *Peile* v. *Stoddart*, 1 M. & G. 192 ; *Turner* v. *Burkenshaw*, 11 W. R. 851, in which cases the mortgagee was affected with notice of trusts.

Sealing up irrelevant parts.

The order for production will give leave to seal up immaterial parts, *Mansel* v. *Feeney* (2), 2 J. & H. 320 ; and where defendants ordered to produce had omitted to state their desire to seal up part of a book in their original affidavit,

15 & 16 Vict. c. 86, s. 18.

they were allowed to make a special application for leave by summons without paying the costs thereof, *Talbot* v. *Marshfield*, 1 L. R. Eq. 6.

A party under such order is justified in making copies, &c. of all parts of the document produced not sealed up under the terms of the order (*Coleman* v. *West Hartlepool Harbour Company*, 5 L. T. N. S. 266).

As to where the parts of a document for which privilege is claimed are so interspersed with the rest of the document that sealing up would be impossible, see *Churton* v. *Frewin*, 2 Dr. & S. 394.

(*s*) See note (*o*), *supra*.

In certain cases defendant, after answer, may file interrogatories for examination of plaintiff.

XIX. It shall be lawful for any defendant in any suit (*t*), whether commenced by bill or by claim, but in suits commenced by bill which the defendant is required to answer, not until after he shall have put in a sufficient answer (*u*) to the bill, and without filing any cross bill of discovery, to file in the record office of the said court interrogatories for the examination of the plaintiff (*w*), to which shall be prefixed a concise statement of the subjects on which a discovery is sought, and to deliver a copy of such interrogatories to the plaintiff or his solicitor; and such plaintiff shall be bound to answer such interrogatories, in like manner as if the same had been contained in a bill of discovery (*x*) filed by the defendant against him on the day when such interrogatories shall have been filed, and as if the defendant to such bill of discovery had on the same day duly appeared; and the practice of the court with reference to excepting to answers for insufficiency, or for scandal (*y*), shall extend and be applicable to answers put in to such interrogatories: Provided that in determining the materiality or relevancy of any such answer, or of any exception thereto, the Court is to have regard, in suits commenced by bill, to the statements contained in the original bill, and in the answer which may have been put in thereto by the defendant exhibiting such interrogatories for the examination of the plaintiff, and in suits commenced by claim, to the statements therein, and in any affidavits which may have been filed either in support thereof or in opposition thereto: Provided also, that a defendant, if he shall think fit so to do, may exhibit a cross bill of discovery against the plaintiff, instead of filing interrogatories for his examination.

Defendant may exhibit a cross bill instead of filing interrogatories.

15 & 16 Vict. c. 86, s. 19.

(*t*) As to what persons interested in the suit may apply, see note (*m*) to last section.

(*u*) A plaintiff may lose his right of priority to an answer (as against a cross bill, and probably) as against a concise statement under this section by *amending his bill*, see *Mertens* v. *Haigh*, 1 J. & H. 231; Daniell, 367: and the plaintiff's right to priority to an answer is only reserved in cases where he *files interrogatories within the proper time*. Therefore, where the plaintiff had not filed any interrogatories within the proper time, a defendant filing cross bill and interrogatories was held entitled to have his cross bill answered before he put in an answer to interrogatories subsequently filed by the original plaintiff (*Garwood* v. *Curteis*, 12 W. R. 509).

Plaintiff loses right of prior answer; by amending or by filing no interrogatories.

"Sufficient answer."

As to the meaning of "sufficient answer," see note (*k*) next page. In *Sibbald* v. *Lowrie*, cited in note to 2 K. & J. 277, the Lords Justices of Appeal allowed interrogatories to be filed under this section, although the six weeks, allowed to the plaintiff for excepting under 1st art. of Ord. XVI. 16, had not expired, subject to the plaintiff's right to move to take them off the file with costs, if the answer was found insufficient. Where exceptions to answer are neither allowed nor disallowed, but simply ordered to stand over till the hearing, the defendant cannot, without special permission, file a concise statement with interrogatories under this section (*Mertens* v. *Haigh*, 1 J. & H. 231).

A defendant may file interrogatories under the section after notice of motion for decree has been given, and the plaintiff has filed his affidavits, and proceedings in the suit will be stayed until the plaintiff has answered, unless there has been excessive delay, *Brancker* v. *Carne*, 2 L. R. Eq. 610.

As to where cross-interrogatories are proper, see *Scott* v. *Meanock*, 10 W. R. 605.

Persons not parties to suit cannot be interrogated on concise statement.

(*w*) The officers of a plaintiff corporation cannot be interrogated under this section where they were not personally plaintiffs. *Imperial Mercantile Credit Association* v. *Witham*, 3 L. R. Eq. 89. Compare cases on production by company under sect. 18, note (*n*), *supra*.

In *United States of America* v. *Wagner*, 3 L. R. Eq. 724, V.-C. Wood allowed a demurrer on the ground that no individual had been put forward by the United States who could be called upon to give discovery upon a cross bill, and see *Prioleau* v. *United States*, 2 L. R. Eq. 659; but *United States* v. *Wagner*, was reversed on appeal, 15 W. R. 1027, where it was said that in such a case a defendant is at liberty to join a new party as defendant to the cross bill for purposes of discovery.

(*x*) When relief is required, a cross bill will still be necessary.

(*y*) As to insufficiency and scandal, see *supra*, sect. 17, and Ord. XL. 11.

Upon application of defendant after answer, plaintiff may be required to produce documents on oath.

XX. (*z*) It shall be lawful for the Court, upon the application of any defendant in any suit, whether commenced by bill or by claim, but as to suits commenced by bill where the defendant is required to answer the plaintiff's bill, not until after he has put in a full and sufficient answer (*a*) to the bill, unless the Court shall make any order to the contrary (*b*), to make an order for the production by the plaintiff in such suit, on oath, of such of the documents in his possession or power relating to the matters in question in the suit, as the Court shall think right (*c*); and the Court may deal with such documents, when produced, in such manner as shall appear just.

After decree co-defendant

(*z*) A defendant may obtain the order *after decree* against a co-defendant, in the same way as he may revive after a decree, see p. 211, note (*g*), *Hart* v.

Montefiore, 30 Beav. 280; but not before decree against any one but the plaintiff, *Attorney-General* v. *Clapham*, 10 Hare, App. lxviii.; see *Wynne* v. *Humberstone*, 27 Beav. 421. Thus the Court refused to make the order at the instance of the defendant against the next friend of a plaintiff, *Hardwick* v. *Wright*, 13 W. R. 860. In such cases, therefore, a cross bill is still necessary, and as to the costs thereof, see *Hardwick* v. *Wright* (l. c.). For the general principles of the Court as to ordering the production of documents, see note (*q*), *supra*.

15 & 16 Vict. c. 86, s. 20.

Before decree, only plaintiff, not next friend.

(*a*) A question was raised as to the meaning of these words in *Lafone* v. *Falkland Islands Company*, 2 K. & J. 276, where it was held that they signify an answer to which *no exceptions have been filed*, and, consequently, that the defendant might under this section move for production, immediately upon putting in his answer, at the peril of showing that his answer, if afterwards excepted to, is sufficient (cf. *Sibbald* v. *Lowrie*, cited in note (*u*) to sect. 19). But in a later case, where a defendant, the day after he had put in his answer, moved for production of documents in the plaintiff's possession, the Court held, that, although the order might be made before the expiration of the six weeks given to the plaintiff to except, by the 1st art. of Ord. XVI. 16, *the plaintiff ought to be given time* to look into the answer, to see whether it was sufficient (*Walker* v. *Kennedy*, 5 W. R. 396; from which case, it seems, that the discretion given in this section by the introduction of the words "unless the Court shall make any order to the contrary," is larger than that given by the 19th section). The rule as laid down in the latter case seems to be more convenient in practice.

"Sufficient answer."

Plaintiff should have time to except.

A voluntary answer is sufficient at once, see *Bailey* v. *Dunkerley*, 6 W. R. 835. If a plaintiff treats an answer as sufficient, see *Boyse* v. *Cokell* (cited, *ante*, p. 169), the defendant may, of course, move under the section. See further as to "sufficient answer," note to Ord. IX. 10, *post*.

The defendant may obtain an order under the section, though he may himself have been required to put in a further affidavit and has not done so, 1 D. J. S. 468.

(*b*) When the plaintiff set out in the bill a letter written by the defendant, and stated that he intended to prove all letters which passed between him and the defendant on the subject-matter of the suit, the Court refused to allow the defendant before putting in his own answer to obtain production of the plaintiff's documents (*Halliday* v. *Temple*, 8 D. M. G. 96; see *Turner* v. *Burkinshaw*, 4 Giff. 399).

Defendant cannot generally move for production till he has answered.

(*c*) The application of the defendant, like that of the plaintiff under sect. 18, need not be supported by affidavit (*Rochdale Canal Company* v. *King*, 15 Beav. 11; 9 Hare, App. xlix. n.); and the same principles appear to be applicable to production by plaintiffs or defendants; see *ante*, notes to sect. 18.

Practice under sect. 18 applies to this section.

XXI. The practice of the said court of issuing commissions to take pleas, answers, disclaimers, and examinations in causes and matters pending in the said court shall, with respect to pleas, answers, disclaimers, and examinations taken within the jurisdiction of the court, be and the same is hereby abolished; and any such plea, answer, disclaimer or examination may be filed without any further or other formality than is required in the swearing and filing of an affidavit (*d*).

Issuing commissions to take answers, &c., within the jurisdiction of the Court abolished.

(*d*) This section does not alter the form of oath to be administered to a defendant on putting in his answer, see note to Ord. XV. 6.

Form of defendant's oath.

XXII. All pleas, answers, disclaimers, examinations,

Pleas, declara-

15 & 16 Vict. c. 86, s. 22.

tions, &c., in Chancery, how to be sworn and taken in Scotland, Ireland, the Channel Islands, &c.

affidavits (*e*), declarations, affirmations, and attestations of honour in causes or matters depending in the High Court of Chancery, and also acknowledgements required for the purpose of enrolling any deed in the said court, shall and may be sworn (*f*) and taken in Scotland or Ireland, or the Channel Islands (*g*), or in any colony, island, plantation, or place under the dominion of Her Majesty in foreign parts, before any judge, Court, notary public, or person lawfully authorized to administer oaths (*h*) in such country, colony, island, plantation, or place respectively, or before any of Her Majesty's consuls or vice-consuls in any foreign parts out of Her Majesty's dominions; and the judges and other officers of the said Court of Chancery shall take judicial notice of the seal or signature (*i*), as the case may be, of any such Court, judge, notary public, person, consul, or vice-consul attached, appended, or subscribed to any such pleas, answers, disclaimers, examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgements, or other documents (*j*) to be used in the said court (*k*).

Section retrospective.

(*e*) The section is retrospective. See *Bateman* v. *Cook*, 3 D. M. G. 39. The provisions in this and the two following sects. as to filing affidavits in Chancery are, by the 57th section of the 16 & 17 Vict. c. 70 (Lunacy Regulation Act), made applicable to affidavits in lunacy.

Affidavits in lunacy.

Form of affidavits.

(*f*) For the form of affidavits and cases where they have been received as evidence notwithstanding irregularities, see Ord. XVIII. 1, and note.

Isle of Man.

(*g*) These provisions are now extended to the Isle of Man by 16 & 17 Vict. c. 78, s. 6, *post*.

Certificate of authority.

(*h*) See *Levitt* v. *Levitt*, 2 H. & M. 626; *Baillie* v. *Jackson*, 3 D. M. G. 38; *Re Earl*, 4 K. & J. 300; *Re Mahon*, 22 L. J. Ch. 75; *Hayward* v. *Stephens*, 36 L. J. Ch. 135; Seton, 21, as showing the necessity of a certificate that the person before whom the affidavit is sworn is lawfully authorised.

Person specially appointed.

But where the party desiring to make an affidavit resided 100 miles from any resident consul, and there was great difficulty in swearing it before a notary public, the Court appointed a resident solicitor special examiner to take the evidence, *Drevon* v. *Drevon*, 12 W. R. 66; and see *Stanford* v. *Lloyd*, 2 W. N. (1867), 77; *Re Kenah*, 15 W. R. 781; and where the fund in Court was small, verification of the signature to an affidavit abroad was dispensed with on a personal undertaking by the solicitor, *Mayne* v. *Butter*, 13 W. R. 128.

Signature of person authorised to administer oath.

(*i*) It must be remembered, that the fact of a consul or other duly authorised person's signature being attached to a document does not make the document itself receivable in evidence, the Court being only bound to take judicial notice of the seal or signature (*Re Forbes*, 1 W. R. 32; see *Re Goss*, 12 Jur. 595).

As to the verification of the signature of the consul, &c., abroad, see *Bateman* v. *Cook*, 3 D. M. G. 39, where it was held, overruling *Brooks* v. *Levey*, 1 W. R. 120, by the full Court of Appeal, that affidavits taken in the colonies,

before the Act passed, in the presence of a person lawfully authorised, were evidence without verification of the signature of the person, before whom they were sworn (see *Anon.*, 1 W. R. 186; *Haggett* v. *Iniff*, 5 D. M. G. 910). See note (*k*), *infra*. 15 & 16 Vict. c. 86, s. 22.

(*j*) These general words were held to include a power of attorney, *Armstrong* v. *Stockham* (l. c.).

(*k*) Notwithstanding the statute, affidavits may still be sworn before notaries public in foreign countries authorised to administer oaths, according to the practice in use before the Act (*Haggit* v. *Iniff*, l. c.); but where an affidavit is sworn before a *foreign* notary the *signature* of the notary must still be proved by affidavit, the Court having no power to take judicial cognizance of the notarial seal as a verification (*Re Earl's Trusts*, 4 K. & J. 300). See *Hutcheon* v. *Mannington*, 6 Ves. 823, as to the credit given to a notary public by the Law of Nations; and see 5 & 6 Will. 4, c. 62, s. 16, for the notary public's credit under the Voluntary Declaration Act. Foreign notary public. Proof of signature of foreign notary.

XXIII. All persons swearing, declaring, affirming, or attesting before any person authorized by this Act to administer oaths and take declarations, affirmations, or attestations of honour shall be liable to all such penalties, punishments, and consequences for any wilful and corrupt false swearing, declaring, affirming, or attesting contained therein as if the matter sworn, declared, affirmed, or attested had been sworn, declared, affirmed, or attested before any Court or persons now by law authorized to administer oaths, and take declarations, affirmations, or attestations upon honour. Penalty for falsely swearing, &c.

XXIV. If any person shall forge the signature or the official seal of any such judge, notary public, or other person lawfully authorized to administer oaths under this Act, or shall tender in evidence any plea, answer, disclaimer, examination, affidavit, or other judicial or official document, with a false or counterfeit signature or seal of any such judge, Court, notary public, or other person authorized as aforesaid, attached or appended thereto, knowing the same signature or seal to be false or counterfeit, every such person shall be guilty of felony, and shall be liable to the same punishment as any offender under an Act passed in the eighth and ninth years of the reign of her present Majesty, intituled an Act to facilitate the admission in evidence of certain official and other documents. Penalty for forging signature or seal of judge, &c., empowered to administer oaths under this Act.

XXV. Pleas, answers, disclaimers, or examinations, whether taken by commission out of the jurisdiction of the said court or otherwise, may be filed without the oath Answers, &c., to be filed without oath of messenger.

15 & 16 Vict. c. 86, s. 25.

of a messenger, and any alterations made therein previously to the taking thereof shall be authenticated according to the practice now in use with respect to affidavits.

Issue may be joined by filing replication as at present.

XXVI. In suits in the said court commenced by bill, where notice of motion for a decree or decretal order shall not have been given (*l*), or, having been given, where a decree or decretal order shall not have been made thereon, issue shall be joined by filing a replication in the form or to the effect of the replication now in use in the said court (*m*); and where a defendant shall not have been required to answer and shall not have answered the plaintiff's bill, he shall be considered to have traversed the case made by the bill (*n*).

Notice of filing replication.

(*l*) See note (*e*) to sect. 15, *ante*, p. 169.

(*m*) As to the form of the replication, see Ord. XVII. 2.

Notice of filing replication is, on the day of filing it, to be given to the solicitor of the adverse party, or to the adverse party himself, if he acts in person (Ord. III. 9). But where, through inadvertence, such notice has not been given, the proper application is to enlarge the time for taking the evidence (see note (*i*), p. 191), and not to take the replication off the file (*Lloyd* v. *Solicitors' and General Life Assurance Society*, 24 L. J. Ch. 704; and see note to Ord. III. 9, *post*).

Traversing note, when necessary.

(*n*) The section cannot be read disjunctively. When, therefore, a defendant has been required to answer the bill, but has not done so, and the time for answering has expired, a traversing note must be filed, as under the old practice (per Lord Romilly, M. R.; *Heath* v. *Lewis*, 2 W. R. 69).

Defendant not having been required to answer, &c., may move for dismissal of bill.

XXVII. Where a defendant to a suit in the said court commenced by bill shall not have been required to answer the bill and shall not have answered the same, such defendant shall be at liberty to move to dismiss the bill for want of prosecution, at such times, and under such circumstances, and subject to such restrictions as shall be in that behalf prescribed by any general order of the Lord Chancellor (*o*).

(*o*) See Ord. XXXIII. 13, and notes.

Practice of court as to and mode of examining witnesses abolished.

XXVIII. The mode of examining witnesses in causes in the said court, and all the practice of the said court in relation thereto, so far as such practice shall be inconsistent with the mode hereinafter prescribed of examining such witnesses, and the practice in relation thereto (*p*),

shall, from and after the time appointed for the commencement of this Act, be abolished: Provided always, that the Court may, if it shall think fit, order any particular witness or witnesses within the jurisdiction of the said court, or any witness or witnesses out of the jurisdiction of the said court, to be examined upon interrogatories (*q*) in the mode now practised in the said court, and that with respect to such witness or witnesses the practice of the said court in relation to the examination of witnesses shall continue in full force, save only so far as the same may be varied by any general order of the Lord Chancellor in that behalf, or by any order of the Court with reference to any particular case.

15 & 16 Vict. c. 86, s. 28.

Particular witnesses may be examined upon interrogatories as now practised.

(*p*) See, for the mode, under the new practice, of taking evidence in a cause where notice of motion for decree is given, note (*h*), p. 169, *ante*, and where issue is joined, see note (*u*), next page.

Evidence.

The alterations introduced in the law of evidence have not altered the principles on which evidence is rejected or admitted (*Lawrence* v. *Maule*, 4 Drew. 472); and see as to the principles of evidence, note (*y*), pp. 184—6, *infra*.

No change in principles of admitting evidence.

(*q*) The Court, under this section, and the 15 & 16 Vict. c. 80, directed a plaintiff, who had made an affidavit, to be cross-examined by the examiner of the court, and made a supplemental order to the effect that all parties should be examined before the examiner *on interrogatories*, (*Hextall* v. *Cheatle*, 1 Sm. & Gif. 78; but see *Routh* or *Rooth* v. *Tomlinson*, 16 Beav. 251; and *Sherwood* v. *Vincent*, 9 Hare, App. xix.), and as to examination on interrogatories before the chief clerk, see notes to 15 & 16 Vict. c. 80, s. 30, *ante*, p. 151.

Examination upon interrogatories.

[XXIX. When any suit commenced by bill shall be at issue, the plaintiff shall, within such time thereafter as shall be prescribed in that behalf by any general order of the Lord Chancellor, give notice to the defendant that he desires that the evidence to be adduced in the cause shall be taken orally or upon affidavit, as the case may be: and if the plaintiff shall desire the evidence to be adduced upon affidavit, and the defendant, or some or one of the defendants, if more than one, shall not, within such time as shall be prescribed in that behalf by any general order of the Lord Chancellor, give notice to the plaintiff or his solicitor that he or they desire the evidence to be oral, the plaintiff and defendants respectively shall be at liberty to verify their respective cases by affidavit (*r*).]

[Plaintiff, where suits by bill at issue may give notice to defendant to adduce evidence orally or by affidavit.]

(*r*) See for the modern practice (by which this section is superseded) the references given in note (*p*) to last section.

Modern practice as to evidence.

15 & 16 Vict. c. 86, s. 30.

[Evidence may be taken orally if required, and Court approve.]

[XXX. When any of the parties to any suit commenced by bill desires that the evidence should be adduced orally, and gives notice thereof to the opposite party as hereinbefore provided, the same shall be taken orally, in the manner hereinafter provided (*s*): Provided that if the evidence be required to be oral merely by a party without a sufficient interest in the matters in question, the Court may, upon application in a summary way, make such order as shall be just.]

(*s*) See note (*u*) to next section as to oral examination under the modern practice, by which this section is superseded.

Witnesses to be examined by one of the examiners of the court in the presence of the parties.

XXXI. All witnesses to be examined (*t*) orally under the provisions of this Act (*u*) shall be so examined by or before one of the examiners of the court (*v*), or by or before an examiner to be specially appointed by the Court (*w*), the examiner being furnished by the plaintiff with a copy of the bill and of the answer, if any, in the cause; and such examination shall take place in the presence of the parties (*x*), their counsel, solicitors, or agents, and the witnesses so examined orally shall be subject to cross-examination and re-examination; and such examination, cross-examination, and re-examination shall be conducted as nearly as may be in the mode now in use in courts of common law with respect to a witness about to go abroad, and not expected to be present at the trial of a cause (*y*).

Examination of witnesses—
(1) De bene esse;
(2) of *unwilling* witnesses.

(*t*) This and the following rules as to examination before an examiner apply in their integrity to the examination of witnesses *de bene esse*, (see Aycb. 175; *Cook* v. *Hall*, 9 Hare, App. xx.; *Reeves* v. *Hodgson*, 21 L. T. 124); and to the examination under it of *unwilling witnesses* in causes where notice of motion of decree *has been* given, see note (*h*), pp. 169, 170, *ante*.

EVIDENCE WHERE ISSUE IS JOINED.

(*u*) The modern practice as to evidence in *causes where issue is joined*, is regulated by the Order of the 5th February, 1861 (*post*), unless the parties agree to follow the practice under this section.

Rules, 5 Feb., 1861.

Ord. 5th February, 1861, r. 6, provides that, ("*except* where the parties *agree to follow the old practice* (r. 10), or where the Court deems it more expedient to follow the old practice on account of the age, &c. of a witness (r. 11), or *in suits to perpetuate testimony* (r. 16), or in causes then pending (r. 17)"), all examinations taken by the examiners of the court, or by any special examiner, for the purpose of being used at the hearing of a *cause in which issue is joined*, shall be taken *ex parte*, and no person shall have a right to be present at the taking of any such examination except the party producing the witness, his counsel, solicitor, and agents; and every examination so taken *ex parte* shall be deemed to be an affidavit, and the examiner, before transmitting the same to the office of the Clerks of Records and Writs

Examination in chief ex parte,

to be filed, shall mark the same as taken *ex parte*, and the Clerks of Records and Writs shall deal with the same as an affidavit. 15 & 16 Vict. c. 86, s. 31.

As to the time for closing the evidence in chief in causes where issue is joined, see note to sect. 38, p. 191, *post*.

The 3rd rule provides that in *causes where issue is joined*, either plaintiff or defendant may, in manner therein mentioned, apply for a norder to take the evidence in chief as to any facts or issues *vivâ voce* at the hearing, and see note to the 7th rule. or vivâ voce at hearing.

The 7th rule provides that "except in the cases mentioned in the 10th, 11th, 16th, and 17th of these rules, no *cross-examination* of any deponent or witness, or of any party to be used at the hearing of *a cause in which issue is joined*, shall be taken otherwise than *before the Court at the hearing*." Cross-examination before Court.

The Court may still, notwithstanding these rules of 5th February, 1861, make use, in a cause where issue is joined, of its powers under sect. 39, *infra*, p. 192, of summoning witnesses before itself, and it has done so where the notices required by the orders of 5th February, 1861, have been accidentally neglected, *Cox* v. *Stephens*, 11 W. R. 929. Court itself may summon witnesses.

Where a suit is brought on by motion for decree, and issue is joined in a cross suit, and an order is obtained by the plaintiff in the original suit for him to use in the cross suit affidavits filed in his own suit, it is at the option of the plaintiff in the cross suit either to treat these affidavits as filed in the original suit, and so cross-examine the witnesses before an examiner, or to consider them as evidence to be used in his own suit, and give notice of cross-examination in open court at the hearing, *Neve* v. *Pennell*, 1 H. & M. 252. Where there is an option as to the practice.

(*v*) The examiners are two in number. Under the old practice, it was their duty to examine all witnesses residing in London and within twenty miles thereof, but now they may be ordered to attend at any place in England or Wales to examine infirm witnesses; and see *Pillan* v. *Thompson*, 10 Hare, App. lxxvi., and Ord. 5th February, 1861, r. 12. In *Brennan* v. *Preston*, however (10 Hare, App. xvii.), where the defendants, who were restrained by interlocutory injunction in a case where the plaintiff had undertaken to submit to any order the Court might make for the early hearing of the cause, and in which no appointment could be obtained for examination before the examiner of the court for upwards of a month, applied that the examination of witnesses residing in London might be taken before a special examiner, the Court granted the application. This, however, was a very peculiar case. Examiners—their duties.

The examination usually takes place at the Examiners' Office. As to the production of witnesses for cross-examination, see notes (*l*) and (*n*) p. 191, *post*. Place of examination.

It seems that witnesses who have waited at the examiners' office for half an hour without receiving any notice that it is intended to proceed with the examination, may leave with impunity, *Perks* v. *Stottart*, 1 N. R. 563. Attendance of witnesses.

A deposit of 3*l*. must be made on obtaining an appointment with an examiner of the court, Order 1 Jan. 1862, *post*.

(*w*) As to the appointment of a special examiner in the case of witnesses residing more than twenty miles from London (for the examination of whom a commission was always issued before the Act), the practice was somewhat unsettled. In *Reed* v. *Prest*, Kay, App. xiv., V.-C. Wood is reported to have said that the former practice was not altered in the case of witnesses residing more than twenty miles from London, and that, therefore, in such cases, a special examiner must still be appointed. See, however, the qualification given to this case in *Brocas* v. *Lloyd*, *infra*, where it is said that the report of it in the *Law Times* was erroneous. Again, in *Ogilby* v. *Gregory*, 4 W. R. 67, the same judge appointed a special examiner to take the cross-examination of witnesses who had made affidavits in London. But in the later case of *Brocas* v. *Lloyd*, 21 Beav. 520, approved by the Lords Justices in *Altree* v. *Sherwin*, 2 De G. & J. 92, the Master of the Rolls expressed great disinclination to appoint a special examiner, even when the witnesses resided in the country, on account of the great expense entailed on the parties by that means. So in *Re Forster's Trusts*, 2 W. R. 679, V.-C. Kindersley is reported to have said that, though the Court had jurisdiction to appoint a special examiner for the purpose of examining witnesses in any cause or matter, yet, ordinarily speaking, the examination must take place in Special examiner.

Special examiner only on special reason.

15 & 16 Vict. c. 86, s. 31.

London, unless there was a special reason why it should take place in the country (comp. *Rogers* v. *Hooper*, referred to in note to 2 W. R. 679). In *Re Forster's Trusts*, the Court ordered the examination and cross-examination of witnesses generally to take place in the country, on the assumption that it should apply to witnesses on both sides. It seems that the witness should in such a case communicate with the party on whose behalf the application was made, throwing on him the *onus* of applying for a special examiner, *Townsend* v. *Williams*, 6 W. R. 734.

Witnesses out of jurisdiction.

The Court may appoint an examiner for the examination of witnesses residing out of the jurisdiction (*Crofts* v. *Middleton*, 9 Hare, App. xviii.); and see *Campbell* v. *The Attorney-General*, 2 L. R. Ch. 571, for the jurisdiction of the Scotch Courts over questions of privileged documents, &c., where an

Special examiner.

examination before a special examiner appointed by the Court of Chancery, takes place within the jurisdiction of the Scotch Courts. As to the form of order in such cases, vid. 9 Hare, App. lxxv. The Court, however, will exercise a discretion in such cases, and will not make the order when no new facts are likely to be elicited (*Lord* v. *Colvin*, 2 W. R. 134).

A motion for an order to compel a witness, who had gone to Paris, to return to this country for the purpose of being cross-examined on his affidavits, was refused with costs, *Wellesley* v. *Mornington*, 5 W. R. 393; *Edwards* v. *Spaight*, 2 J. & H. 617. In such a case the proper course would have been to have applied for a special examiner, *Rawlins* v. *Wickham*, 4 Jur. N. S. 990.

Application for special examiner.

In *M'Neill* v. *Acton*, 22 L. J. Ch. 584, it was held that an application for a special examiner ought to be made in court (*Brennan* v. *Preston*, 10 Hare, App. xvii.; *Pillan* v. *Thompson*, 10 Hare, App. lxxvi.). It is now settled, however, that the application may be made in chambers (*Reed* v. *Prest*, Kay, App. xiv.; and see *Williams* v. *Williams*, 10 Hare, App. xlv.). Where the application is for an examination *ex parte*, the practice is for the Court to appoint without a reference to chambers, *Davenport* v. *Goldberg*, 2 H. & M. 286.

Who may be.

It is not imperative that a special examiner should be a barrister (*Henderson* v. *Philipson*, 17 Jur. 615). But in cases of difficulty it seems a barrister

Fees.

ought to be appointed (*Reed* v. *Prest*, l. c.). The fee of a special examiner is five guineas a day, and five shillings for his clerk, and he is not entitled to any further fee for the labour of reading over papers, or other extra labour (*Payne* v. *Little*, 21 Beav. 65). As to the fees now to be allowed to a special examiner when examining witnesses in the country, see schedule annexed to Order 5th Feb., 1861, *post*.

(*x*) Where a defendant has given notice to read a co-defendant's evidence, notice of cross-examination of such co-defendant must be given to the defendant who has thus made him his witness, *Pennell* v. *Davison*, 14 W. R. 174.

Expenses of witnesses.

(*y*) It seems that professional witnesses, even though residing within the bills of mortality, may require compensation before giving evidence (*Clark* v. *Gill*, 1 K. & J. 19). The scale of allowance in such a case does not depend on a witness's valuation of his own time, but consists of a fixed payment, corresponding with that allowed in courts of common law (*Nokes* v. *Gibbon*, 3 Jur. N. L. 282; *Turner* v. *Turner*, 7 W. R. 573). A witness may demand to have his travelling expenses paid before attending to be examined (*Brocas* v. *Lloyd*, 23 Beav. 129; and when brought up to be examined he may insist, before giving evidence, on being paid for his loss of time, *Wiltshire* v. *Marshall*, 1 W. N. (1866), 80; and the rule applies to parties to suits as well as to other witnesses (*Davey* v. *Durrant*, 24 Beav. 493).

Several examinations.

A witness may be examined twice over, *Wood* v. *Scarth*, 24 L. J. Ch. 392; and see *Lord* v. *Colvin*, 3 Drew. 222.

Cross-examination by defendant.

It has been held that a defendant may cross-examine his co-defendant's witnesses, all the *evidence* in the suit being now *open to all parties* to it (*Lord* v. *Colvin*, Daniell, 850; and see *Sturgis* v. *Morse*, 26 Beav. 562; and note (*i*), p. 170; and *Powys* v. *Blagrove*, Kay, 495); but *cross-examination* of a defendant is not evidence against co-defendants, see note at p. 194, *post*.

15 & 16 Vict. c. 86, s. 31.

As to the order of cross-examination where there are several cross-examining parties, see *Harrison* v. *Mayor of Southampton*, 2 Jur. N. S. 435.

Documents put into the hands of witnesses, &c.

On the examination of witnesses under this section, it was held that if a document is put into the hands of a witness by the party examining him, the other side may require to see the document, if the witness having a document put into his hands to refresh his memory is afterwards examined on the contents generally; but not if it is put into his hands to refresh his memory, or to state in whose handwriting it is only (per V.-C. Kindersley in *Lord* v. *Colvin*, 2 Drew. 208; affirmed on appeal, 5 D. M. G. 47).

Documents, &c. referred to.

Where an examination in bankruptcy of a bankrupt was referred to in the evidence of the plaintiff (the official assignee), it was held that the defendant was entitled to have the examination produced in cross-examining the plaintiff's witnesses (*Bell* v. *Johnson*, 1 J. & H. 682). *Secus* as to examinations not referred to (*ibid.*); see, too, as to a document referred to becoming evidence, *Howard* v. *Robinson*, 4 Drew. 522, 525; and as to the inspection of documents, see note to sect. 18, p. 175, *ante*. See also *Davis* v. *Dale*, 1 Mood. & M. 514, 515; *Perry* v. *Gibson*, 1 Ad. & Ell. 48.

Whether examiner's office an open court.

It seems that an examiner has full power to allow a shorthand writer to be present, or to admit the public if he think fit (*Wright* v. *Wilkin*, 6 W. R. 643, which should be consulted as to the powers and privileges of an examiner in general). See, also, as to the employment of a shorthand writer, *Re London, Birmingham, and Bucks Railway Company, Ex parte Curzon*, 6 W. R. 141.

Depositions to be taken down in writing and read over to the witness, who is to sign the same.

XXXII. The depositions taken upon any such oral examination as aforesaid shall be taken down in writing by the examiner (*z*), not ordinarily by question and answer, but in the form of a narrative, and when completed shall be read over to the witness, and signed by him in the presence of the parties, or such of them as may think fit to attend: Provided always, that in case the witness shall refuse to sign the said depositions, then the examiner shall sign the same, and such examiner may, upon all examinations, state any special matter to the Court as he shall think fit: Provided also, that it shall be in the discretion of the examiner to put down any particular question or answer, if there should appear any special reason for doing so; and any question or questions which may be objected to shall be noticed or referred to by the examiner in or upon the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement on the face of the depositions, but he shall not have power to decide upon the materiality or relevancy of any question or questions (*a*); and the Court shall have power to deal with the costs of immaterial or irrelevant depositions as may be just.

On refusal, examiner to sign, and state any special matter he may think fit.

15 & 16 Vict. c. 86, s. 32.

(*z*) The examiner is *bound* to take the depositions down in his own handwriting (*Stobart* v. *Todd*, 2 W. R. 617). But the rule appears to be different on an examination before the chief clerk under the 15 & 16 Vict. c. 80, s. 30, see *Rogers* v. *Mort*, 10 Hare, App. liii.

Examiner must take down depositions himself.

(*a*) The examiner ought not, where the examination is taken *ex parte*, to refuse to allow questions to be put, unless upon matters which would clearly not be evidence, *Surr* v. *Walmsley*, 2 L. R. Eq. 439.

Power of examiner.

The examiner has no power to determine questions as to the adverse nature of the evidence of a witness (*Buckley* v. *Cooke*, 1 K. & J. 29). In such cases the questions as well as the answers of the witness should be put down by the examiner (*ibid.*; see, too, *Wright* v. *Wilkin*, 6 W. R. 643, cited in note (*y*), last page).

Right of witness to see affidavit on which he is cross-examined.

A witness, when cross-examined on his affidavit, has no right, it seems, to insist that the paragraph in his affidavit on which he is cross-examined should be shown to him before he answers the questions (*Gwynne* v. *Watney*, 31 L. T. 231, but it is believed that this case has not been generally followed. See *East Anglian Railway Company* v. *Goodwin*, cited note (*o*), p. 192; and see cases cited in note (*y*), last page, on documents put into the hands of witnesses.

If parties refuse to be sworn, &c., the same course to be pursued as is now adopted.

XXXIII. If any person produced before any such examiner as a witness shall refuse to be sworn, or to answer any lawful question put to him by the examiner, or by either of the parties, or by his or their counsel, solicitor, or agent, the same course shall be adopted with respect to such witness as is now pursued in the case of a witness produced for examination before an examiner of the said court, upon written interrogatories, and refusing to be sworn, or to answer some lawful question: Provided always, that if any witness shall demur or object to any question or questions which may be put to him (*b*), the question or questions so put, and the demurrer or objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the record office of the said court, to be there filed; and the validity of such demurrer or objection shall be decided by the Court; and the costs of and occasioned by such demurrer or objection shall be in the discretion of the Court.

Proviso as to witness demurring to questions.

Process where witness demurs to answering.

(*b*) When a witness objects to answer because the examination is *irregular*, the party examining him should move that the examination may proceed, (*Rendle* v. *Metropolitan and Provincial Bank*, 15 W. R. 1068; *Leather Cloth Company, Limited*, v. *Hurschfield*, 1 H. & M. 295); but if he objects that he is *protected* from making the discovery, the demurrer should be set down for hearing; and see as to the orders which may be made overruling or allowing the demurrer, Daniell, 863; and as to the costs following the result, *Wright* v. *Wilkin*, 4 Jur. N. S. 527.

Grounds on which he may demur.

When before this Act, a commissioner, notwithstanding the demurrer of a witness, took upon himself to examine a witness, the depositions were suppressed, even though the demurrer was held untenable (*Goodall* v. *Gawthorn*,

4 De G. & Sm. 97). The same course would probably be adopted under the new practice. A witness may demur to answering a question on the ground of professional confidence (see note (*r*), p. 175, *ante*), or he may refuse to answer a question upon the ground that the answer would criminate him (see p. 176), without giving his reasons: but, if he discloses his reasons, the Court will consider the objection; and if it finds it unfounded, will compel him to answer (*Aston's case*, 27 Beav. 474; 4 De G. & J. 320; *Reg.* v. *Boyes*, 7 Jur. N. S. 1158; *Re Fernandez*, 10 C. B. N. S. 3, 39, 40); and see generally as to the grounds on which a witness may object to making discovery, the cases cited; as to production of documents, *ante*, pp. 175, 176. 15 & 16 Vict. c. 86, s. 33.

The sections relating to evidence in the Com. Law Proc. Act, 1854, apply to suits in equity, *Buckley* v. *Cooke*, 1 K. & J. 29.

XXXIV. When the examination of witnesses before any examiner shall have been concluded, the original depositions, authenticated by the signature of such examiner (*c*), shall be transmitted by him to the record office of the said court, to be there filed (*d*), and any party to the suit may have a copy thereof or of any part or portion thereof upon payment for the same in such manner as shall be provided by any general order of the Lord Chancellor in that behalf (*e*). Original depositions to be transmitted to the record office, and filed.

(*c*) Where an examiner omitted to sign the depositions, they were allowed to be filed without delay upon payment of costs, and upon a proper explanation being given (*Stephens* v. *Wanklin*, 19 Beav. 585). And when an examiner dies without signing, they may be signed by his successor (*Bryson* v. *Warwick and Birmingham Canal Company*, 1 W. R. 124; or filed without any signature, *Felthouse* v. *Bailey*, 14 W. R. 827.) Omission to sign depositions.

(*d*) An examiner appointed under this section to take evidence for the *hearing* of the cause, must return *all* the depositions at once; but it seems the same rule does not apply, if the evidence is taken under sect. 40 (*Clark* v. *Gill*, 1 K. & J. 13). Filing of depositions.

(*e*) See as to copies, Ord. XXXVI.; as to the fees for copies, see Reg. IV.; as to costs, App. xlix. *post*. Copies.

XXXV. It shall not be necessary to sue out any commission for the examination of any witnesses within the jurisdiction of the said court; and any examiner appointed by any order of the Court shall have the like power of administering oaths (*f*), as commissioners now have under commissions issued by the Court for the examination of witnesses. Commission for examination of witnesses dispensed with.

[Examiner empowered to administer oaths.]

(*f*) For form of oath, see Daniell, III. 849.

XXXVI. Notwithstanding that the plaintiff or the defendant in any suit in the said court may have elected that the evidence in the cause should be taken orally, affidavits by particular witnesses, or affidavits as to par- Affidavits as to particular facts, &c., may be used.

15 & 16 Vict. c. 86, s. 36.

ticular facts or circumstances, may, by consent, or by leave of the Court obtained upon notice, be used on the hearing of any cause, and such consent, with the approbation of the Court, may be given by or on the part of married women or infants or other persons under disability (*g*).

(*g*) See note (*u*) to sect. 31, *ante*, for the modern practice as to oral evidence.

Affidavits to be divided into numbered paragraphs.

XXXVII. Every affidavit to be used in the said court shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and, as nearly as may be, shall be confined to a distinct portion of the subject (*h*).

(*h*) See Ord. XVIII. and notes, as to the form of affidavits.

Evidence oral or by affidavit, on both sides, to be closed as prescribed by general order.

XXXVIII. The evidence on both sides in any suit in the said court, whether taken orally or upon affidavit, shall be closed within such time or respective times after issue joined as shall in that behalf be prescribed by any general order of the Lord Chancellor (*i*), but with power to the Court to enlarge the same as it may see fit; and after the time fixed for closing the evidence no further evidence, whether oral or by affidavit, shall be receivable, without special leave of the Court previously obtained for that purpose (*k*): Provided always, that any witness who has made an affidavit, filed by any party to a cause, shall be subject to oral cross-examination within such time after the time fixed for closing the evidence as shall be prescribed in that behalf by any order of the Lord Chancellor (*l*), by or before an examiner (*m*), in the same manner as if the evidence given by him in his affidavit had been given by him orally before the examiner, and after such cross-examination may be re-examined orally by or on the part of the party by whom such affidavit was filed; and such witness shall be bound to attend before such examiner to be so cross-examined and re-examined, upon receiving due and proper notice, and payment of his reasonable expenses, in like manner as if he had been duly served with a writ of subpœna ad testificandum

Witnesses by affidavit may be orally cross-examined and afterwards re-examined.

Witnesses bound to attend.

before such examiner (*n*); and the expenses attending such cross-examination and re-examination shall be paid by the parties respectively, in like manner as if the witness so to be cross-examined were the witness of the party cross-examining, and shall be deemed costs in the cause of such parties respectively, unless the Court shall think fit otherwise to direct.

15 & 16 Vict. c. 86, s. 38.

As to expenses attending cross-examinations, &c.

(*i*) In a cause where issue is joined, the time is eight weeks, fixed by Ord. 5th Feb. 1861, rule 5; and in a cause where notice of motion for decree is given, the time is limited by Ord. XXXIII. 4, 7; but in hard cases the time has been extended, see note (*k*) *infra*.

Time for closing evidence.

The remainder of this section, providing for cross-examination before an examiner, does not now apply to causes where issue is joined; see note (*u*) to sect. 31, *supra*.

Cross-examination.

(*k*) The case of the time for closing evidence expiring in long vacation is provided for by Ord. XXXVII. 19, *post*. The time for filing affidavits and taking evidence may be enlarged in proper cases, see *Anderton* v. *Yates*, 15 Jur. 833; *Mayes* v. *Mayes*, 11 Jur. N. S. 1033; *Wragg* v. *Wragg*, 11 Jur. 701. See note (*m*) p. 182.

Time when enlarged.

Thus, where affidavits were filed just before the close of the eight weeks after issue joined, containing charges as to which no issue had been raised in the pleadings, counter affidavits were allowed, *Scott* v. *Mayor of Liverpool*, 1 De G. & J. 369; and similar leave was given, the period for cross-examination being also enlarged, in *Phillips* v. *Warde*, 2 Jur. N. S. 33; and see *Hope* v. *Threlfall*, 1 Sm. & G. App. xxi.; *Douglas* v. *Archbutt*, 23 Beav. 293. So the Court has a discretion to allow such affidavits to be read at the hearing, *Boyse* v. *Colclough*, 1 K. & J. 124; *Thompson* v. *Partridge*, 4 D. M. G. 794; *Bayley* v. *Cass*, 10 W. R. 370; and the cause may be ordered to stand over, to give the other side time to answer them, *Heath* v. *Wallingford*, 12 L. T. N. S. 631.

Cases of surprise.

For purpose of answering late affidavits, or to explain them.

Where the Court gave a plaintiff leave, seven months after he had given notice of motion for decree, to use as evidence an examination of the defendant taken in another cause, the defendant was allowed to file affidavits in explanation, though the cause was in the paper, *Watson* v. *Cleaver*, 20 Beav. 137.

The Court has a discretion to allow one party to cross-examine the other's witnesses before filing his own affidavits, see *Morey* v. *Vandenburg*, 14 L. T. N. S. 542.

The application for extended time should not be made *ex parte*, *Richards* v. *Curlewis*, 2 W. R. 481.

Not applied for ex parte.

As to proving exhibits at the hearing, see *ante*, p. 130; Daniell, 816.

Exhibits proved at hearing.

Where the time for closing the evidence is past, and a witness is required to produce documents, &c., at the hearing, he may be compelled by a *subpœna duces tecum* to do so; and it seems that such a subpœna may be moved for before the hearing (*Vorley* v. *Jerram*, 6 W. R. 734).

Leave was granted, after the time for closing evidence had passed, to file affidavits verifying extracts from a register of a Scotch court of law, *McLachlan* v. *Lord*, 14 L. T. N. S. 98.

(*l*) The time for giving notice to the other side to produce a witness is fourteen days, from the closing of the evidence in chief; see Ord. 5th Feb. 1861, rule 19, *post*.

Time for cross-examination.

(*m*) See notes to sect. 31, 35, *ante*, as to the practice before the examiner.

Practice of cross-examination.

(*n*) See Ord. 5th Feb. 1861, rules 19, 20, & 21, *post*, and notes, as to due and proper notice, and as to enforcing the attendance of witnesses.

A party cannot, after giving notice of his intention to cross-examine a party to the suit, abandon that course without first paying the costs occasioned thereby, *Davey* v. *Durrant*, 24 Beav. 411.

Witnesses, notice to produce.

15 & 16 Vict. c. 86, s. 39.

Court may require oral examination before itself of witnesses, &c.

XXXIX. Upon the hearing of any cause depending in the said court, whether commenced by bill (*o*), or by claim, the Court, if it shall see fit so to do (*p*), may require the production and oral examination before itself of any witness or party in the cause, and may direct the costs of and attending the production and examination of such witness or party, to be paid by such of the parties to the suit, or in such manner, as it may think fit (*q*).

Oral examination before Court ordered by Court.

(*o*) As to the application of this section to causes where notice of motion for decree is given, see note (*k*) to sect. 15, p. 170; it has been held that when made use of on motion for decree, it only applies to witnesses who have given evidence (*East Anglian Railway Company* v. *Goodwin*, 6 W. R. 564), or who are called to prove documents (see note (*c*), p. 130); *Chichester* v. *Chichester*, 24 Beav. 289; *Ferguson* v. *Wilson*, 15 W. R. 27. And in causes where issue is joined, its provisions are, in most cases, superseded by the Order, 5th Feb. 1861; see note (*u*), *ante*, p. 184.

See form of subpœna to testify *vivâ voce*, Appendix, vii. *post*.

At hearing of motion.

An order may be made, under this section, upon a motion for injunction, *Nichols* v. *Ibbetson*, 7 W. R. 430.

At hearing of cause.

The proper time for the Court to exercise its discretion (see *Oliver* v. *Wright*, 1 Sm. & G. App. xvi.; *Evans* v. *Coventry*, 27 L. T. 39), under this section, is at the hearing, *Raymond* v. *Brown*, 4 De G. & J. 530; so that the proper course of proceeding is not to move for leave to issue a *subpœna ad testificandum* for the hearing of the cause, but to apply at the hearing for an order that the witnesses may attend, which order the Court, if it sees fit, will make (*May* v. *Biggenden*, 1 Sm. & G. 133, 10 Hare, App. xlv., where *Smith* v. *The Swansea Dock Company*, 9 Hare, App. xx., is remarked on; and see *Radley* v. *Meek*, 25 L. T. 90). It is doubtful whether a subpœna is necessary in such a case (*Holden* v. *Holden*, 7 D. M. G. 397; *Hope* v. *Liddell*, 20 Beav. 438); see Seton, 14, *Vorley* v. *Jerram*, 6 W. R. 734; and for form of subpœna, see Appendix, p. vii. *post*.

Discretion of Court.

(*p*) See *Farrall* v. *Davenport*, 5 L. T. N. S. 436. When the party sought to be examined is one of the litigants, who has already had an opportunity of stating what he knew on oath, it seems that the application ought not in general to be granted (*Oliver* v. *Wright*, 1 Sm. & Giff. App. xvi.). If granted, the order will be at the risk of the party applying for it (*Radley* v. *Meek*, 25 L. T. 90).

Where Court will and will not order examination before itself.

It seems that in general the Court will only order a witness to attend to be examined at the hearing, where under the old practice it would have granted an issue (per. V.-C. Turner, in *Wilkinson* v. *Stringer*, 9 Hare, App. xxiii.; comp. *Deaville* v. *Deaville*, 9 Hare, App. xxii.; *Ferguson* v. *Wilson*, 15 W. R. 27; and see notes to 21 & 22 Vict. c. 27, s. 3, *post*, as to cases where issues will be granted generally, and *Davison* v. *Robinson*, 3 Jur. N. S. 791, 793). In *Smith* v. *Edwards*, 1 W. R. 18, the plaintiff having applied to be allowed to prove *vivâ voce*, at the hearing, that a defendant was out of the jurisdiction, a fact which the other defendants contended was not sufficiently proved by the affidavits, the Court ordered the cause to stand over to enable the plaintiff to prove the fact (cf. *Raworth* v. *Parker*, cited in note (*h*) p. 170). When on the original hearing of a cause a defendant had tendered himself for examination, and the offer was refused, the Court of Appeal refused to call upon him to be examined before itself (*Hindson* v. *Weatherill*, 5 D. M. G. 301).

Court of Appeal.

But a Court of Appeal has undoubted authority to examine *vivâ voce* a party who was not examined before the Court below (*Hope* v. *Threlfall*, 23 L. J. Ch. 631; *Langford* v. *May*, 1 W. R. 484; and cf. *Re Dickson*, 3 Jur. N. S. 29; *Lister* v. *Leather*, *id.* 433; *Pole* v. *Joel*, 2 De G. & J. 285; *Glover* v.

Daubney, 9 Jur. N. S. 90; *Ferguson* v. *Wilson*, 15 W. R. 27). When such witnesses are examined, and the appeal is successful, the appellant will be entitled to the costs of the appeal (*Langford* v. *May*, *ante*). 15 & 16 Vict. c. 86, s. 39.

Before a witness is examined *vivâ voce* by the Court under this section, the matter in issue, as stated in the bill, should be placed before the witness, and the particular passage marked, and the witness's affidavit relating to it should be given him, and he should be told that a further examination was wanted upon it, per V.-C. Wood, in *East Anglian Railway Company* v. *Goodwin*, 6 W. R. 564. Course adopted on examination.

(*q*) As to costs, see *Martin* v. *Pycroft*, 22 L. J. Ch. 94; *Langford* v. *May*, *ibid.* 978. Costs of examination before Court.

XL. Any party in any cause or matter depending in the said court may, by a writ of *subpœna ad testificandum*, or *duces tecum* (*r*), require the attendance of any witness (*s*), before an examiner (*t*) of the said Court, or before an examiner specially appointed for the purpose, and examine such witness orally, for the purpose of using his evidence upon any claim, motion, petition, or other proceeding before the Court, in like manner as such witness would be bound to attend and be examined with a view to the hearing of a cause; and any party having made an affidavit to be used or which shall be used on any claim, motion, petition, or other proceeding (*u*) before the Court, shall be bound on being served with such writ to attend before an examiner, for the purpose of being cross-examined (*v*): Provided always, that the Court shall always have a discretionary power of acting upon such evidence as may be before it at the time (*w*), and of making such interim orders, or otherwise, as may appear necessary to meet the justice of the case. Any party in a cause may by subpœna require attendance of any witness before an examiner.

(*r*) For forms of these subpœnas, see Appendix, p. vii. *post.*

The subpœna for documents must specify the documents required, and must be founded on the ordinary affidavit as to documents (as to which, see *ante*, note (*p*), p. 173; *Fiott* v. *Mullins*, 1 Sm. & Giff. 1; *Wing* v. *Harvey*, *ibid.* App. x.; *McIntosh* v. *Great Western Railway Company*, *ibid.*; or the application for documents under it will be dismissed with costs, *Lee* v. *Angas*, 2 L. R. Eq. 59; *Newland* v. *Steere*, 13 W. R. 1014. Subpœna for documents must not be vague.

(*s*) As to examination of witnesses in causes where notice of motion for decree is given, see note (*h*) pp. 169, 170, *ante;* and where issue is joined, see note (*u*) to sect. 31, p. 184, *ante.* Subpœna for witness before examiner.

In the case of evidence to be used at the hearing, each party may now be compelled to produce their own witnesses for cross-examination, Ord. 5th Feb. 1861, r. 19, *post.* Production of witness.

(*t*) As to the mode of conducting the examination, see notes to sects. 31—34, *ante*; and *Clark* v. *Gill*, cited note (*d*) to sect. 34. What affidavits are open to cross examination.

(*u*) The following affidavits have been decided to be within this section:—

An affidavit made in support of a petition under the Trustee Relief Act, *Re Bendyshe*, 5 W. R. 816. Affidavits under the Relief Act.

15 & 16 Vict. c. 86, s. 40.

A creditor's affidavit as to his claim, even though he has obtained a judgment at law, *Cast* v. *Poyser*, 3 Sm. & Gif. 369 ; *Re Baker*, 11 W. R. 1127.

of creditor verifying claim;

An accounting defendant's affidavit verifying his claim, *Re Lord*, 2 L. R. Eq. 605 ; but see Ord. XXXV. 34.

of plaintiff applying for leave to amend.

An affidavit filed in support of an application for leave to amend, *Catholic Publishing Company* v. *Wyman*, 11 W. R. 399 ; but when the Court, exercising its discretion, had given leave to amend, it was held that no purpose could be answered by allowing the cross-examination, which was therefore refused (*ibid.*) ; and see *Hooper* v. *Campbell*, *infra*.

On motions.

An affidavit in support of, or against a motion for decree (*Williams* v. *Williams*, 17 Beav. 156, 10 Hare, App. xlv.), or of interlocutory motions, *Lloyd* v. *Whitty*, 19 Beav. 57. But when an affidavit had been filed in support of a motion for injunction, but the motion went off, it was held that the affidavit was not open to cross-examination, *Hooper* v. *Campbell*, 13 W. R. 1003.

Affidavit as to documents.

An affidavit as to documents is not within the section, note (*p*), p. 174.

Answer of defendant.

A defendant's answer in a cause where notice of motion for decree is given, is open to cross-examination within the section, see sect. 59, *post*, p. 223 ; *Rehden* v. *Wesley*, 26 Beav. 432 ; *Wightman* v. *Wheelton*, 23 Beav. 397 ; and the defendant will not be allowed to read his answer on a motion for decree, unless the plaintiff has had an opportunity to cross-examine him (*ibid.*) ; and see next note.

For and against whom cross-examination is evidence.

But the *cross-examination* cannot be read *against co-defendants* (*Rehden* v. *Wesley*, l. c.). Where a plaintiff on motion for decree gives notice of his intention to read one defendant's answer against another defendant, such defendant is entitled to cross-examine the plaintiff thereon, see *Dawkins* v. *Mortan*, 1 J. & H. 339 ; and though the defendant's answer thus becomes the plaintiff's affidavit, the plaintiff may still cross-examine him upon it, *Brumpfit* v. *Hart*, 11 W. R. 53.

Affidavit cannot be withdrawn,

A party cannot elect to withdraw his witness instead of producing him for cross-examination, *Catholic Publishing Company* v. *Wyman*, 1 N. R. 512 ; *Cauty* v. *Holditch*, 14 Sim. 75 ; *Clarke* v. *Law*, 2 K. & J. 28 ; but see *Re Sykes*, 2 J. & H. 415.

unless merely formal.

Where the affidavit was a formal one, merely proving service abroad, and had no relation to the merits of the case, a motion for cross-examination was disallowed, *Official Manager of National, &c. Association* v. *Carstairs*, 11 W. R. 866.

(*v*) See note (*u*) to sect. 31, *ante*, p. 184, as to causes where issue is joined.

(*w*) As to a cause standing over when a witness was too ill to appear for cross-examination, see *Nason* v. *Clamp*, 12 W. R. 973.

If no opportunity to cross-examine, affidavit has less weight but may be admitted.

Affidavits which the opposite party has had no opportunity of testing by cross-examination may, in pressing cases (but see *Bingley* v. *Marshall*, 6 L. T. N. S. 682), be admitted, but will have less weight attached to them : *e.g.*, where a plaintiff at law moved to dissolve an injunction, and the motion was not allowed to stand over that the other side might cross-examine his witnesses, *Normanville* v. *Stanning*, 10 Hare, App. xx. ; *Mayer* v. *Spence*, 1 J. & H. 87 ; *Wightman* v. *Wheelton*, 23 Beav. 397 ; but see *Besemeres* v. *Besemeres*, Kay, App. xviii., where the motion stood over that the witnesses might be cross-examined. For other cases where affidavits have been admitted for what they were worth, though on account of death or from other causes, no cross-examination had taken place on them, see *Abadom* v. *Abadom*, 24 Beav. 243 ; *Morley* v. *Morley*, 5 D. M. G. 610 ; *Davies* v. *Otty*, 13 W. R. 484 ; *Braithwaite* v. *Kearns*, 34 Beav. 202 ; *Ridley* v. *Ridley*, *ibid.* 329 ; *Tanswell* v. *Scurrah*, 11 L. T. N. S. 761 ; and see note to Ord. XIX. 4, *post*.

How any subsequent evidence is to be taken.

XLI. In cases where it shall be necessary for any party to any cause depending in the said court to go into evidence subsequently to the hearing of such cause, such

evidence shall be taken as nearly as may be in the manner hereinbefore provided with reference to the taking of evidence with a view to such hearing (*x*). 15 & 16 Vict. c. 86, s. 41.

(*x*) See now, as to evidence taken after the hearing, Ord. 5th Feb., 1861, r. 15, which preserves the old practice of taking such evidence. Examination of witnesses after hearing.

A special order for the examination of witnesses under this section is unnecessary (*Anon.*, 23 L. J. Ch. 24); and a special application under such circumstances was refused with costs (*Howard* v. *Sewell*, 1 W. R. 124).

See further as to the cross-examination of a witness upon his affidavit after *decree*, before the chief clerk, *ante*, p. 151.

XLII. It shall not be competent to any defendant in any suit in the said court to take any objection for want of parties to such suit in any case to which the rules next hereinafter set forth extend; and such rules shall be deemed and taken as part of the law and practice of the said court, and any law or practice of the said court inconsistent therewith shall be and is hereby abrogated and annulled (*y*). Defendant not to take objection for want of parties in any case to which rules herein set forth shall extend.

Rule 1. Any residuary legatee or next of kin may, without serving the remaining residuary legatees or next of kin, have a decree for the administration of the personal estate of a deceased person (*z*).

Rule 2. Any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold, may, without serving any other legatee or person interested in the proceeds of the estate, have a decree for the administration of the estate of a deceased person (*z*).

Rule 3. Any residuary devisee or heir may, without serving any co-residuary devisee or co-heir, have the like decree (*z*).

Rule 4. Any one of several *cestuis que trust* under any deed or instrument may, without serving any other of such *cestuis que trust*, have a decree for the execution of the trusts of the deed or instrument (*a*).

Rule 5. In all cases of suits for the protection of property pending litigation, and in all cases in the nature of waste, one person may sue on behalf of himself and of all persons having the same interest.

Rule 6. Any executor, administrator, or trustee may

15 & 16 Vict. c. 86, s. 42.

obtain a decree against any one legatee, next of kin, or *cestui que trust* for the administration of the estate, or the execution of the trusts (*z*).

Rule 7. In all the above cases the Court, if it shall see fit, may require any other person or persons to be made a party or parties to the suit, and may, if it shall see fit, give the conduct of the suit to such person as it may deem proper, and may make such order in any particular case as it may deem just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

Rule 8. In all the above cases the persons who, according to the present practice of the court, would be necessary parties to the suit, shall be served with notice of the decree (*b*), and after such notice they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit, and they may by an order of course have liberty to attend (*c*) the proceedings under the decree; and any party so served may, within such time as shall in that behalf be prescribed by the general order of the Lord Chancellor, apply to the Court to add to the decree (*d*).

Rule 9. In all suits concerning real or personal estate which is vested in trustees under a will, settlement, or otherwise, such trustees shall represent (*e*) the persons beneficially interested under the trust, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit; but the Court may, upon consideration of the matter, on the hearing, if it shall so think fit, order such persons, or any of them, to be made parties (*f*).

15 & 16 Vict. c. 86, s. 42.

(*y*) The section is retrospective, *Fowler* v. *Bayldon*, 9 Hare, App. lxxviii. As to parties to suits generally, see Daniell, 187—287.

As to instituting suits to execute the trusts of a will in the absence of the heir at law, see Ord. VII. 1, *post*.

Section retrospective.

And as to proceeding against some of several persons jointly and severally liable, see Ord. VII. 2, *post*.

Decree in absence of parties;

And as to making a decree in the absence of a trustee, see sect. 49 of the Trustee Act, *ante*, p. 108; and see Ord. XXIII. 11, *post*, as to cases in which a decree may be made, saving the rights of absent parties.

(*z*) As to the section applying to proceedings under the Trustee Relief Act, see *Re Colson*, cited in note (*r*), p. 73; under the Trustee Act, 1850, note (*x*), p. 103, *ante*; and under the Special Case Act, note (*b*), p. 118, *ante*.

Representatives of former party dispensed with.

A suit may be proceeded with, without making the real representatives of residuary devisees, who have died abroad before the institution of the suit, parties to the suit, although the devisees themselves have through ignorance of their death been so named (*Bateman* v. *Cooke*, 1 W. R. 242).

Sect. 44.

And compare cases cited in note to sect. 44, *infra*, as to dispensing with personal representatives of deceased person.

See as to making several of a numerous class represent the class both as plaintiffs and defendants, *Bromley* v. *Williams*, 32 Beav. 177.

One of several cestuis que trusts or trustees made party.

(*a*) So one *cestui que trust* may, without serving his *co-cestui que trust*, obtain an order for the appointment of new trustees (*Jones* v. *James*, cited note (*x*), p. 103, *ante*).

A *cestui que trust* may make one of several trustees or *cestuis que trusts* liable for a breach of trust without making the other trustees parties, see Ord. VII. 2, *post*, and note; and without making the other *cestuis que trusts* parties (*McLeod* v. *Annesley*, 16 Beav. 600; but see *Jesse* v. *Bennett*, 6 D. M. G. 355, cited *post*, note (*e*); *Bridget* v. *Hames*, 1 Coll. 72).

Old practice of praying that persons interested might be bound.

(*b*) The old practice was to make all persons interested parties, and to serve those against whom no direct relief was sought with a copy of the bill, and to pray that they might be bound by all the proceedings, see Ord. X. 11, and notes.

Serving parties with notice of decree.

See now as to serving notice of the decree, Daniell, 395, 398; and as to serving it on infants, Ord. VII. 5, *post*; *Clarke* v. *Clarke*, 1 W. R. 48.

Memorandum of service is to be entered in the office of the Clerks of Records and Writs, Ord. XXIII. 19, 20, *post*.

Out of jurisdiction.

Notice of the decree may be served out of the jurisdiction, *Strong* v. *Moore*, 22 L. J. Ch. 917; *Chalmers* v. *Laurie*, 10 Hare, App. xiii.; *Maybery* v. *Brooking*, 7 D. M. G. 673.

Who are to be served.

The judge in chambers will direct who are the proper persons to be served, *De Balinhard* v. *Bullock*, 9 Hare, App. xiii.; see for mode of obtaining such direction, 7th Regul. as to business, Aug. 1857, Appendix, p. liv. *post*.

Not parties who *acquire* interest in suit.

Persons who at the date of the decree had no interest in the suit cannot be brought into court under this rule, and when trustees appointed after decree obtained an order of course to attend the proceedings, it was discharged as irregular, *Colyer* v. *Colyer*, 11 W. R. 355.

Order for liberty to attend proceedings.

(*c*) See *Lewis* v. *Clowes*, 10 Hare, App. lxii. and note; and for form of order, see Seton, 1213.

When parties served with notice of a decree do not attend proceedings at chambers, it is not necessary before signing the certificate to serve them with summons to proceed, *Green* v. *Measures*, 1 W. N. (1866), 122.

(*d*) See Ord. XXIII. 18, *post*.

Practice on and effect of such service.

When a party served with notice of the decree feels himself aggrieved thereby, he should move the Court on notice for leave to file a bill in the nature of a bill of review (*Kidd* v. *Cheyne*, 18 Jur. 348); but *semble* he may appeal against the decree, *Ellison* v. *Thomas*, 1 D. J. S. 18. Service of notice of a decree for sale in a suit does not make the decree binding on a judgment creditor, who is not a party to the cause (*Knight* v. *Pocock*, 24 Beav. 436; see also as to rule 8, generally, *Doody* v. *Higgins*, 9 Hare, App. xxxii.).

When trustees represent *cestuis que trusts*.

(*e*) This rule does not apply when the trustees have disclaimed (*Young* v. *Ward*, 10 Hare, App. lviii.); nor ordinarily, where surviving trustees only, or

15 & 16 Vict. c. 86, s. 42.

the representatives of such as are dead only, are made parties (*Stansfield* v. *Hobson*, 16 Beav. 189).

(1) Where the *cestuis que trusts* are parties to administration suits.

In an administration suit, the trustees of a marriage settlement sufficiently represented the children of the marriage under the rule, *Densem* v. *Elworthy*, 9 Hare, App. xlii. ; but its operation is not confined to administration suits (*Fowler* v. *Bayldon*, 9 Hare, lxxviii. ; comp. *McLeod* v. *Annesley*, 16 Beav. 600). In applying it generally, however, the Court will exercise the discretion given by the concluding clause.

(2) Where they are defendants to foreclosure suits.

The trustees of mortgaged property may not generally represent their *cestuis que trusts* in a suit to foreclose them, *Tudor* v. *Morris*, 1 Sm. & Giff. 503 ; *Cropper* v. *Mellersh*, 24 L. J. Ch. 430 ; *Goddass* v. *Williams*, 2 Y. & C. C. C. 595 ; *Wilton* v. *Jones*, *ibid.* 244. *Cropper* v. *Mellersh*, however, was commented upon with disapprobation by V.-C. Wood in *Wilkins* v. *Reeves*, 3 W. R. 305 ; and in a similar suit, *Goldsmid* v. *Stonehewer*, 9 Hare, App. xxxviii., it was held that infant *cestuis que trusts* were sufficiently represented by their trustees, but as to adult *cestuis que trusts*, it was held that they ought to have the opportunity of redeeming; and, therefore, the decree of foreclosure should not be made against the trustee only; and see *Fowler* v. *Bayldon*, l. c. ; and in another case the Court made a decree for sale of a mortgaged estate in the absence of infant *cestuis que trusts* and of the representative of a deceased adult *cestui que trust* upon an affidavit of the trustee that it would be for the benefit of the infants, and at the same time ordered the proceeds to be paid into court (*Siffken* v. *Davis*, Kay, App. xxi. marginal note).

Infant and adult cestuis que trusts.

Where trustees have both the mortgaged land and the money.

A surviving trustee for sale and executrix, who was also tenant for life of the property, sufficiently represented the parties in remainder under this section in a suit for foreclosure and sale (*Marriott* v. *Kirkham*, 3 Giff. 536). And in cases where the executors of a deceased mortgagor are parties to a suit for foreclosure (*Sale* v. *Kitson*, 3 D. M. G. 119 ; *Hanman* v. *Riley*, 9 Hare, App. xl.), it has been held that the *cestuis que trusts* need not be joined in the suit, upon the ground, apparently, that the whole property out of which the mortgage is to be satisfied is represented (*Sale* v. *Kitson*, l. c. ; but see the statute 17 & 18 Vict. c. 113, by which the mortgaged lands are made primarily liable to the payment of the mortgage debt). Possibly, since the latter Act, the Court may be disposed to put a greater latitude upon this section in suits for the foreclosure and sale of mortgaged property. See, too, 22 & 23 Vict. c. 35, s. 14, *post*, giving power to devisees in trust of real estate to sell the same for payment of debts notwithstanding the want of any express power in the will.

Locke King's Act.

Friendly society.

A friendly society which had no treasurer or board to represent it, and had become insolvent, and long since ceased to exist, was held to be sufficiently represented on the record by the trustees, *Pare* v. *Clegg*, 29 Beav. 589. See, too, *Bromley* v. *Williams*, 1 N. R. 413.

Trustee Act. Settled Estates Act.

As to trustees with a power of sale representing their *cestuis que trusts* on a petition under the Trustee Acts, see note (*a*), p. 104, *ante*, and on a petition under the Settled Estates Act, see note to sect. 17 of that Act, p. 244, *post*.

When trustees may not represent cestuis que trusts.

Trustees do not sufficiently represent their *cestuis que trusts* on a bill to set aside a settlement (*Reed* v. *Prest*, 1 K. & J. 183) ; and in a suit to restore trust property instituted by the representatives of a trustee against his co-trustee, both of whom had committed breaches of trust, in which some of the *cestuis que trusts* had concurred, such *cestuis que trusts* were held necessary parties (*Jesse* v. *Bennett*, 6 D. M. G. 355 ; see, too, *Devaynes* v. *Robinson*, 24 Beav. 86, 99, and *Payne* v. *Parker*, 1 L. R. Ch. 327).

Executor with power of sale, within Act.

Executors with a power of sale are within the section (*Shaw* v. *Hardingham*, 2 W. R. 657) ; and where there was a devise to trustees subject to the payment of debts with a general residuary devise over, the general residuary devisee was held to be an unnecessary party to a suit to carry the trusts of a will into execution (*Smith* v. *Andrews*, 4 W. R. 353). In *Bolton* v. *Stannard*, 6 W. R. 570, however, where there was only an implied power of sale in the executrix, Sir John Romilly, M. R., held that she was not a trustee within the section ; but see now 22 & 23 Vict. c. 35, s. 14, cited above, and Lewin, 343, 348 ; Williams on Executors, 1856.

(*f*) Notwithstanding the above rules, it *was held* that when an estate is to be sold under the decree of the Court, all persons interested in the property ought, if possible, to be made parties to the suit, or at least to be served with notice of the decree under rule 8; so that a purchaser's title might not afterwards be impugned; but see now 22 & 23 Vict. c. 35, sect. 23, *post*; *Doody* v. *Higgins*, 9 Hare, App. xxxii.; *Pigott* v. *Pigott*, 8 L. T. N. S. 268; and see *Cuddick* v. *Cook*, 32 Beav. 70. 15 & 16 Vict. c. 86, s. 42. Sales by decree of Court.

Where executors who had obtained indemnity under 22 & 23 Vict. c. 35, s. 29, were improperly made defendants in a suit to recover assets, the Court refused to make the legatees parties under this section, *Clegg* v. *Rowland*, 3 L. R. Eq. 368. *Defect in parties* not remedied under section.

XLIII. The practice of the said court of setting down a cause merely on an objection for want of parties to the suit shall be abolished (*g*). Setting down cause on objection for want of parties abolished.

(*g*) See Ord. XXIII. 11, and notes.

XLIV. (*h*) If in any suit or other proceeding (*i*) before the Court it shall appear to the Court that any deceased person who was interested in the matters in question has no legal personal representative, it shall be lawful for the Court either to proceed in the absence of any person representing the estate of such deceased person (*k*), or to appoint some person (*l*) to represent such estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the Court shall think fit, either specially or generally by public advertisements; and the order (*m*) so made by the said Court, and any orders consequent thereon, shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly constituted legal personal representative of such deceased person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared and submitted his rights and interests to the protection of the Court. Court may proceed in any suit, &c., without representative of deceased person, or may appoint one.

(*h*) Under the old practice, administration *ad litem*, *i.e.*, limited to the proceedings taken in Chancery, was, in cases of pressing necessity, granted by the Ecclesiastical Court (Mitf. Pl., pp. 204 *et seqq.*), and now by the Court of Probate, see Williams on Executors, 498. It seems that an administrator *ad litem* was never treated as a sufficient representative, where the object of the suit was not only to bind but to administer the estate (*Groves* v. *Levi* or *Lane*, 9 Hare, App. xlvii. n.). *Secus* when the object was merely to bind the estate (*Davis* v. *Chanter*, 2 Ph. 545; *Maclean* v. *Dawson*, 27 Beav. 369; Administration ad litem limited to the purposes of the suit.

15 & 16 Vict. c. 86, s. 44.

and see *Devaynes* v. *Robinson*, 24 Beav. 86; and *Williams* v. *Allen*, 32 Beav. 656; nor will the Court order money to be paid out to an administrator *ad litem* (*ibid*). And it is enacted by the Probate Act, s. 70, "that the administrator so appointed shall have all the rights and powers of a general administrator *other than the right of distributing the residue of such personal estate*." The administrator may also be appointed receiver of the rents of real estate (s. 71). By the 73rd section of the same Act, the Court of Probate may, "whenever it shall appear necessary or convenient by reason of the insolvency of the deceased or other special circumstances," appoint a nominee of its own to be administrator of the personal estate of a deceased person, and "*every such administration may be limited as the Court shall see fit*," *Re John Jones*, 6 W. R. 276. See Williams on Executors, 500.

Does not give right of general administration.

20 & 21 Vict. c. 77.

Other proceedings."

(*i*) Special cases under Sir Geo. Turner's Act, (*Swallow* v. *Binns*, 9 Hare, App. xlvii.); and petitions (*Re Stewart*, *ibid.*), are within the section.

(*k*) For cases where the death of a party to the suit causes no abatement, see note (*q*), p. 212. Revocation of a probate or administration pending a suit causes no abatement, 20 & 21 Vict. c. 77, s. 76.

Section does not apply—

(1) where no difficulty in administration;

(2) where interest of party to be bound is not represented;

(*l*) This section was not intended to apply to cases (1) Where there is no difficulty in obtaining representation, see *Long* v. *Storie*, 1 Kay, App. xii. (in which case V.-C. Wood refused to act behind the back of a person who was on the point of administering to the estate). (2) Where the interest of the party to be bound is wholly unrepresented in the suit, *Cox* v. *Stephens*, 11 W. R. 929; see *Gibson* v. *Wills*, 21 Beav. 620; where a question arose between surviving children and the representatives of deceased children, and the living children asked that as representation had not been taken out to two of the deceased children, one might be appointed under this section, but Lord Romilly, M. R., refused, and said: "It is clear that there is a hostile question for discussion, and the plaintiffs ask the Court to appoint a nominee of their own to represent their adversaries. If the Court sees that there are other persons present who *bonâ fide* represent the interest of those absent, it may allow that interest to be represented, but it will not allow the whole adverse interest to be represented." See also *Headden* v. *Emmott*, 22 L. T. 166, the *dicta* in which case, however, must be taken with some qualification (see the observations of the Master of the Rolls in *Dean of Ely* v. *Gayford*, 16 Beav. 561). So a general representative is required when a decree is sought against the very party to be represented, as where a sub-mortgagee sought a decree for foreclosure, without making the personal representatives of the first mortgagee parties, *Bruiton* v. *Birch*, 22 L. J. Ch. 911; the objection will not apply, however, when the heir at law and executors named in the will of a deceased person, whose estate may be charged by the suit, are parties, though the executors have not proved (*Goddard* v. *Haslam*, 3 W. R. 357). Comp. *Ex parte Cramer*, 9 Hare, App. xlvii.; *Williams* v. *Rowlands*, 3 N. R. 233. Nor does the section apply (3) where the object of the suit is not only to bind but to administer (see note (*h*) *supra*) the estate of the intestate (*Silver* v. *Stein*, 1 Drew. 295; *Groves* v. *Levi* or *Lane*, 9 Hare, App. xlvii.; but see *Jones* v. *Foulkes*, 10 W. R. 55, where by consent the order was made under the general jurisdiction), even though the whole interest of the person whose estate is sought to be represented has been assigned, and the administrator is alleged to be out of the jurisdiction (*Donald* v. *Buther*, 16 Beav. 26); and even though an administrator *ad litem* be before the Court (*Groves* v. *Levi*, l. c.). In *James* v. *Aston*, 2 Jur. N. S. 224; *Maclean* v. *Dawson*, 27 Beav. 21; the bill was filed to set aside transactions on the ground of fraud of the intestate, but as the result of such setting aside would have been an administration decree, it was held that the section did not apply. (4) Nor where a personal representative of the intestate would have active duties to perform in the execution of the decree, *Fowler* v. *Baylden*, 9 Hare, App. lxxviii. So the Court will not, under this section, appoint a person to receive a sum of money in court, payable to a deceased person, though the amount be small (*Rawlins* v. *McMahon*, 1 Drew. 225); and even where a representative has been appointed in the suit, it will not direct the money to be paid to him, but will order it to be carried over to a separate account

(3) where general administration is sought;

(4) or the administrator ad litem would have to be active.

(*Byam* v. *Sutton*, 19 Beav. 646). Nor will money be paid out to an administrator *ad litem* (note (*h*) *supra*). 15 & 16 Vict. c. 86, s. 44.

Where a necessary party to a suit had disappeared many years before in Australia, and it was not certain that he was dead, so that his legal personal representative could not be made a party, a representative *ad litem* to protect his interest was appointed, *Mortimer* v *Mortimer*, 11 W. R. 740. Where the Court *will* act under section.

And where it is difficult to obtain representation to the intestate's estate, and it is not important that his interest should be separately represented, the Court will act under the section, *e.g.*, where the intestate had no beneficial interest, and his estate was insolvent, *Chaffers* v. *Headlam*, 9 Hare, App. xlvi.; but as to insolvency, see *Cox* v. *Stephens*, 11 W. R. 929; so where there were two executors, co-defendants, and one of them, who was also a residuary legatee, but who had not proved the will, or acted in the trust thereof, died insolvent and without a representative, after the usual order for taking the accounts had been made, it was held that the suit might proceed, as if his legal personal representative had been served and had appeared, (*Rogers* v. *Jones*, 1 Sm. & G. 17; *Davies* v. *Boulcott*, 1 Dr. & Sm. 23; *Ashmall* v. *Wood*, 4 W. R. 60, 110; cf. *Bessant* v. *Noble*, 26 L. J. Ch. 236; *Band* v. *Randle*, 2 W. R. 331, where a representative was dispensed with). Where intestate was insolvent.

And, as a general rule, the Court, it seems, will incline to act under the section, when the next of kin expressly refuses to administer (*Haw* v. *Vickers*, 1 W. R. 242; *Tarrett* v. *Lloyd*, 2 Jur. N. S. 371); or pays no attention to a notice calling upon him to administer (*Whiteaves* v. *Melville*, 5 W. R. 676; *Davies* v. *Boulcott*, l. c.); or dies without doing so, *Swallow* v. *Binns*, 9 Hare, App. xlviii.; but see 20 & 21 Vict. c. 77, s. 73, *ante*, under which the Court of Probate may grant limited administration to its own nominee. Refusal of next of kin to administer.

In a suit for an account of a trading association in India, and contribution, the Court appointed the Indian executor of a deceased associate his representative under the section, *Sutherland* v. *De Virenne*, 2 Jur. N. S. 301. And where a defendant, interested in an estate which was being administered by the Court, died abroad, and his executors proved the will abroad but refused to prove it in this country, the Master of the Rolls (following *Hewetson* v. *Todhunter*, 22 L. J. Ch. 76) appointed a representative of the deceased defendant, in order that the suit might be revived against him (*Bliss* v. *Putnam*, 29 Beav. 20). Will proved abroad.

The section, too, applies where the claim of the deceased defendant is consequent upon a remote possibility. So a claim for the appointment of new trustees was allowed to proceed in the absence of a personal representative of a deceased person, when such deceased person had an interest in the trust funds, in the event of the death of his child (the infant plaintiff), but had died indebted, and without any other property (*Magnay* v. *Davidson*, 9 Hare, App. lxxxii.); and *à fortiori*, when the interests of the deceased defendant are identical with those of the plaintiff, or with those of other parties represented, *Hewetson* v. *Todhunter*, l. c.; *Cox* v. *Taylor*, 22 L. J. Ch. 910; and *Long* v. *Storie*, Kay, App. xii.; where a subsequent mortgagee (one of eight persons standing in a precisely similar situation, and in respect of whose mortgages only one right of redemption was given), having died after a decree for foreclosure, the Court, there being difficulty in obtaining representation to his estate, held that the suit might proceed without any person representing it, see the marginal note; and comp. *Abrey* v. *Newman*, 10 Hare, App. lxviii. n.; where a declaration that children took *per capita*, and not *per stirpes*, was made in the absence of the personal representatives of the deceased children; and *Tarrett* v. *Lloyd*, l. c., where on a bill filed for the specific performance of an agreement for a lease entered into by four defendants in joint tenancy, one of whom died after suit was instituted, intestate and insolvent, the Court, on the next of kin appearing in court, and declining to take out administration (see *Davies* v. *Boulcott*, l. c.), ordered a person to be appointed to represent the estate of the deceased person. And see *Williams* v. *Allen*, 10 W. R. 512; reversing, s. c. 29 Beav. 292, where the suit was instituted against a trustee to make him personally liable for trust funds come into the hands of tenants for life, and the Lords Justices held that the estates of such tenants for life were sufficiently represented by an administrator *ad litem*. See Williams on Executors, 1863. Claim remote. Or identical with that of parties represented.

15 & 16 Vict. c. 86, s. 44.

Where a decree had been made in ignorance of the death of a defendant before decree, a statement was inserted that the Court proceeded in the absence of his personal representative, *Rucker* v. *Scholefield*, 1 N. R. 180.

Order made after decree.

Where a cause was ordered to stand over for want of parties, with liberty to the plaintiff to amend, by adding them or their representatives, a motion that the suit might proceed in the absence of a representative of one of such parties who had died without leaving one, was refused with costs (*Williams* v. *Page*, 27 Beav. 373).

Refused where cause stood over for want of parties.

Who will and will not be appointed.

The proper person to be appointed under this section is the person who would be appointed administrator *ad litem* (*Dean of Ely* v. *Gayford*, 16 Beav. 361 ; see *ante*, note (*h*)). Where a defendant died and his will was not proved in consequence of a contest as to one of his testamentary papers, the Court appointed the executor named in his will to represent him (*Hele* v. *Lord Bexley*, 15 Beav. 340. Cf. *Ashmall* v. *Wood*, l. c.). So the executor of a testator who had proved the will in India, but had refused to take out letters of administration in England, was appointed to represent his estate under this section (*Sutherland* v. *De Virenne*, 2 Jur. N. S. 301 ; see, too, *Hewetson* v. *Todhunter*, 22 L. J. Ch. 76). But where a will appointing a person executrix, and giving the testator's estate to her, was being contested in the Probate Court, the Court refused to appoint such person to represent the testator's estate in a suit to take the partnership accounts of a firm of which the testator was a member, *Rowlands* v. *Evans*, 33 Beav. 202.

Executor who proved abroad.

Executors of next of kin.

Widow.

In *Swallow* v. *Binns*, 9 Hare, App. xlvii., in which case the executors of a father, who had survived, and became the next sole of kin of his deceased children, were appointed to represent the estates of the deceased children. In *The Dean of Ely* v. *Gayford* or *Edwards*, 16 Beav. 561, a widow was appointed to represent the estate of her husband, who was a tenant for life of tithes, and had died without a personal representative.

Consent must be given.

No order can be made without the consent of the person sought to be appointed (*Hill* v. *Bonner*, 26 Beav. 372 ; *The Prince of Wales, &c. Company* v. *Palmer*, 25 Beav. 605). In a suit instituted to establish a settlement, the Court refused to appoint a person disputing the settlement, and already appointed receiver of the deceased settlor's estate, to represent the settlor (*Vacy* v. *Vacy*), 1 L. T. N. S. 267).

Form, &c., of order.

(*m*) As to the form of an order under this section, see *Hele* v. *Lord Bexley*, 15 Beav. 340 ; *Whittington* v. *Gooding*, 10 Hare, App. xxix. ; Seton on Decrees, p. 1178. The application for it is usually made by motion *ex parte ;* but before the order is drawn up notice should be given to the persons entitled to administer (*Davies* v. *Boulcott*, 1 Drew. & Sm. 23) ; but it seems that the order may be made at the hearing (*Hewetson* v. *Todhunter*, 22 L. J. Ch. 76 ; *Mendes* v. *Guedalla*, 10 W. R. 485). This course was pursued in *Lloyd* v. *Attwood*, L. J. Nov. 3, 1858. In *Chaffers* v. *Headlam*, 9 Hare, App. xlvi., it was made on motion on notice to all parties.

Creditor, &c., may summon executor, &c., to show cause why an order for administration of personal estate should not be granted.

XLV. (*n*) It shall be lawful for any person claiming to be a creditor, or a specific pecuniary or residuary legatee, or the next of kin, or some or one of the next of kin, of a deceased person, to apply for and obtain as of course, without bill or claim filed, or any other preliminary proceedings, a summons (*o*) from the Master of the Rolls or any of the Vice-Chancellors, requiring the executor or administrator, as the case may be, of such deceased person, to attend before him at chambers, for the purpose of showing cause why an order for the administration of the personal estate of the deceased should not be granted ;

and upon proof by affidavit of the due service of such summons, or on the appearance in person or by his solicitor or counsel of such executor or administrator, and upon proof by affidavit of such other matters, if any, as such judge shall require, it shall be lawful for such judge, if in his discretion he shall think fit so to do, to make the usual order for the administration of the estate of the deceased, with such variations, if any, as the circumstances of the case may require (*p*), and the order so made shall have the force and effect of a decree to the like effect made on the hearing of a cause or claim between the same parties; provided that such judge shall have full discretionary power to grant or refuse such order, or to give any special directions touching the carriage or execution of such order, and in the case of applications for any such order by two or more different persons or classes of persons, to grant the same to such one or more of the claimants or of the classes of claimants as he may think fit: and if the judge shall think proper, the carriage of the order may subsequently be given to such party interested, and upon such terms as the judge may direct (*q*).

15 & 16 Vict. c. 86, s. 45.

Power to judge to order administration of such estate.

(*n*) As to proceedings at chambers under these sections, see Ord. XXXV. 3.

Section applies to simple administration only.

The section applies only to simple cases. When, therefore, the defendant in an administration summons set up a release, the validity of which was disputed, the Court dismissed the summons as irregular (*Acaster* v. *Anderson*, 19 Beav. 161); and the Court refused to make an administration decree on summons taken out by a married woman in her husband's absence, as no satisfactory proof could be given of his death under that mode of proceeding, *Re Sampson*, 14 W. R. 472; but see *West* v. *Laing*, 3 Drew. 331, and note (*p*), *infra*.

Whether it applies to cases of assignment; of appointment.

Whether the assignee or mortgagee of a residuary legatee can obtain the summons, seems to be doubtful (*Whittington* v. *Edwards*, 3 De G. & J. 243).

The Court has power under this section to make an order for the administration of the effects bequeathed by the will of a married woman made in pursuance of a power (*Sewell* v. *Ashley*, 3 D. M. G. 933); but it will not do so at the instance of an appointee who is not a legatee, or otherwise entitled to administer the general assets under this section, *Re Newbery*, 10 W. R. 378.

Form of summons.

(*o*) For form of summons see Ord. XXXV. 3, *post*; referring to Sched. K. 2, Appendix, p. xxii. *post*.

What order made on summons.

(*p*) In general only the usual administration order will be made on an administration summons (*Partington* v. *Reynolds*, 4 Drew. 253; *Blakely* v. *Blakley*, 1 Jur. N. S. 368; *Re Fryer*, 3 K. & J. 317. Cf. *Jones* v. *Morrell*, 2 Sim. N. S. 241). But the Court has power, on reasonable grounds, to direct further accounts or inquiries on such a summons (*Mutter* v. *Hudson*, 2 Jur. N. S. 34; *Delevante* v. *Childe*, 6 Jur. N. S. 118); and where the suit was commenced by summons, and in the course of inquiries therein directed, it became necessary to determine the validity of an alleged agreement for a settlement, in order to ascertain the amount of personal estate, it was held that the chief clerk had power to determine such question, *Wadham* v. *Rigg*, 2 Dr. & Sm. 78; and

Further inquiries.

15 & 16 Vict. c. 86, s. 45.

after an order made on the summons, the Court will stay an action at law against the executor, as after a decree obtained on a bill (*Gardner* v. *Garrett*, 20 Beav. 469). In *Brooker* v. *Brooker*, 3 Sm. &. G. 475, V.-C. Stuart made an order for an injunction and receiver, as against the administratrix of a deceased intestate, after the common decretal order had been made in chambers, a case of wilful default against the administratrix having come out in the course of the proceedings under the order in chambers, &c. (see, too, as to wilful default, *Tickner* v. *Smith*, 3 Sm. & G. 42, before the same judge). But this case has not been generally followed, for in *Partington* v. *Reynolds*, 4 Drew. 253, V.-C. Kindersley held that the Court had no power to charge the defendant as for wilful default, as by so doing, it would be directing accounts on a footing inconsistent with the decree itself (see *Delevante* v. *Childe*, l. c.; *Hodson* v. *Ball*, 1 Phil. 177; *Coope* v. *Carter*, 2 D. M. G. 298; *Massey* v. *Massey*, 2 J. & H. 728; *Nelson* v. *Booth*, 3 De G. & J. 119, under the 54th section, and the cases cited above).

Not a decree charging executor with wilful default;

In *Re Wiltshire's Estate*, 8 W. R. 133; it was held by V.-C. Stuart, that an executor cannot, on an administration summons, be charged upon an admission of assets.

or on admission of assets;

Where the representative of an executrix in effect refuses to account, a person interested is always justified in filing a bill, and will be allowed the costs of such bill, particularly if questions of construction arise (*Smith* v. *Spilsbury*, 1 Drew. & Sm. 151).

or with refusal to account.

(*q*) As to staying proceedings where two administration suits have been instituted for the same purpose, see note to Ord. VI. 1.

Staying suit after summons.

Copy of summons to be filed in record office of court.

XLVI. A duplicate or copy of such summons shall, previously to the service thereof, be filed in the record office of the said court; and no service thereof upon any executor or administrator shall be of any validity unless the copy so served shall be stamped with a stamp of such office indicating the filing thereof; and the filing of such summons shall have the same effect with respect to lis pendens (*r*) as the filing of a bill or claim.

(*r*) See 2 & 3 Vict. c. 11.

Creditor, &c., may obtain an order for administration of real estate.

XLVII. It shall be lawful for any person claiming to be a creditor of any deceased person, or interested under his will, to apply for and obtain in a summary way, in the manner hereinbefore provided with respect to the personal estate of a deceased person, an order for the administration of the real estate of a deceased person, where the whole of such real estate is by devise vested in trustees, who are by the will empowered to sell such real estate, and authorized to give receipts for the rents and profits thereof, and for the produce of the sale of such real estate (*s*); and all the provisions hereinbefore contained with respect to the application for such order in relation to the personal estate of a deceased person, and consequent

thereon, shall extend and be applicable to an application for such order as last hereinbefore mentioned with respect to real estate (*t*). 15 & 16 Vict. c. 86, s. 47.

(*s*) A devisee of real estate, subject to the payment of a testator's debts and funeral and testamentary expenses, is a trustee within the section (*Ogden* v. *Lowry*, 4 W. R. 156. See also *Pigott* v. *Young*, 7 W. R. 235, V.-C. K.; and 22 & 23 Vict. c. 35, s. 14, and Williams on Executors, p. 1856), Lewin, 343, 348. Devisee of real estate subject to debts.

(*t*) See the notes to sect. 45.

XLVIII. It shall be lawful for the Court in any suit for the foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee (*u*), or of any subsequent incumbrancer, or of the mortgagor (*v*), or any person claiming under them respectively to direct a sale of such property, instead of a foreclosure of such equity of redemption, on such terms as the Court may think fit to direct (*w*), and if the Court shall so think fit, without previously determining the priorities of incumbrances, or giving the usual or any time to redeem; provided that if such request shall be made by any such subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the Court shall not direct any such sale, without the consent of the mortgagee or the persons claiming under him, unless the party making such request shall deposit in court a reasonable sum of money, to be fixed by the Court (*x*), for the purpose of securing the performance of such terms as the Court may think fit to impose on the party making such request. Court may direct sale of mortgaged property instead of a foreclosure on such terms as it may think fit.

(*u*) See for the practice before and under the section, Davidson, II. 552. Object of section.

The right of an *equitable* mortgagee by deposit without memorandum is foreclosure, not sale, *Samble* v. *Wilson*, 5 N. R. 395; and see Seton, 448. Mortgagee's right to sale.

Even a legal mortgagee cannot obtain an order under this section, except where it would be for the advantage of all parties. The Court will not, therefore, act under it, when such a course would be an act of oppression towards the mortgagor, as, for instance, when it would dispossess a family of an old family estate (*Hurst* v. *Hurst*, 16 Beav. 375, which see generally). And when the mortgagor or subsequent incumbrancer dissent, the mortgagee must make out a special case, in order to induce the Court to order a sale (*Roberts* v. *Price*, 1 W. R. 303; and comp. *Hiorns* v. *Holtom*, 16 Jur. 1077, where the Master of the Rolls expressed a reluctance to order a sale under this section, unless by consent, except in cases when there was such a complication that the common decree could not be conveniently worked out). In a foreclosure suit against an infant, the Court, it being clearly for his benefit, ordered an immediate sale (*Mears* v. *Best*, 10 Hare, App. li.); see *Wigham* v. *Measor*, 5 W. R. 394; and see *Siffken* v. *Davies*, Kay, App. xxi., cited in note (*e*) to sect. 42. In this case, however, the Court required an affidavit by the trustee that the sale would be advantageous to the infant. Where the mortgagors were When mortgagor dissents.

15 & 16 Vict. c. 86, s. 48.

bankrupt, and there were several incumbrancers, the Court directed a sale (*Cator* v. *Reeves*, 9 Hare, App. liii. n.). So, though in *Wickham* v. *Nicholson*, 19 Beav. 38, a sale was ordered at the request of the first and second mortgagees and mortgagor, the third mortgagee refusing to consent; (and see *Paine* v. *Edwards*, 10 W. R. 709; *Foster* v. *Harvey*, 11 W. R. 899; 12 W. R. 92), yet in *Messor* v. *Boyle*, 21 Beav. 559, it was held, that a judgment creditor ranking after a first mortgagee, but prior in date to a further charge and to other judgments, was entitled to a decree for foreclosure and redemption, although the other parties desired a sale; see now as to sales by a judgment creditor, note (*a*), p. 3, *ante*. Comp. *Footner* v. *Sturgis*, 5 De G. & Sm. 736; *Tuckley* v. *Thompson*, 1 J. & H. 126, and cases there cited.

When some of the incumbrancers dissent.

When mortgagee dissents.

(*v*) It was said that there can be no sale of mortgaged property, except subject to the mortgage, without the mortgagee's consent (*Wickenden* v. *Rayson*, 6 D. M. G. 210); but now the mortgagor may obtain the order though the mortgagee dissents, *Newman* v. *Selfe*, 33 Beav. 522; and as to the right of a tenant for life, subject to incumbrances, to ask for a sale, see *Cook* v. *Cholmondeley*, 5 W. R. 835. Where the sale is applied for by and granted at the instance of a second incumbrancer, the Court, in the exercise of its discretion, will give the conduct of the sale to the first mortgagee (*Hewitt* v. *Nanson*, 7 W. R. 5; and see Daniell, 1167, and Ord. XXXV. 13, *post*).

Conduct of sale.

On what terms sale is ordered.

(*w*) The Court will not, under this section, in the first instance, or in the absence of the owners of the equity of redemption, direct a sale, but will, as in the case of a foreclosure, fix a day for the payment, and, in default, direct a sale (*Smith* v. *Robinson*, 1 Sm. & G. 140; comp. *Lloyd* v. *Whittey*, 17 Jur. 754); unless all the parties consent (*Anning* v. *Lavers*, 1 W. R. 19); but in *Newman* v. *Selfe*, 33 Beav. 522, the Master of the Rolls held that the Court might direct an immediate sale notwithstanding the dissent of the mortgagor; and in *Marriott* v. *Kirkham*, 10 W. R. 340, an immediate sale was ordered. The usual time is six months (*Lloyd* v. *Whittey*, l. c.). In *Whitfield* v. *Roberts*, 7 W. R. 216, the time fixed was four months from the certificate, and this time was afterwards extended; but when a sale was manifestly for the benefit of all parties, the Court directed it to take place in one month (*Staines* v. *Rudlin*, 9 Hare, App. liii., note; and cf. *Wigham* v. *Measor*, 5 W. R. 394; where an immediate sale was ordered). It seems that an equitable mortgagee is not, even since the Act, entitled to a decree for sale except by consent (*Cox* v. *Toole*, 20 Beav. 145, *sed quære*).

Foreclosure need not be prayed for.

It has been held by V.-C. Stuart, that mortgagees may, under this section, file a bill for an account of what is due to them, and for a sale, although the mortgage contains a power of sale, and *a foreclosure is not prayed for* by the bill (*Hutton* v. *Scaley*, 6 W. R. 350). See also, in connection with this section, *Sporle* v. *Whayman*, 20 Beav. 607; *Macrae* v. *Ellison*, 4 Jur. N. S. 967.

At what stage of suit sale ordered.

The Court will not, under this section, order a sale on an interlocutory application (*Wayn* v. *Lewis*, 1 Drew. 487; and it has been said that a sale cannot be directed after a decree for foreclosure has been made (*ibid.*); even on the application of the mortgagee (*Girdleston* v. *Lavender*, 9 Hare, App. liii.).

Whether after decree for foreclosure.

And in a case in which a decree for foreclosure had been made in February, 1851, and in January, 1853, after report made, an order was taken by consent that the plaintiff, the first mortgagee, should be at liberty to continue in possession until the 23rd of June, 1854, and that upon payment within one week after that date of the amount due, the plaintiff should convey, &c., but that in default of such payment the defendants should be foreclosed without further order or further extension of time, a motion by the second mortgagee for further extension of time, and that in the meantime the property might be sold under this section, was refused, with costs (*Campbell* v. *Moxhay*, 18 Jur. 641; see marginal note). In *Laslett* v. *Cliffe*, 2 Sm. & G. 278, however, V.-C. Stuart considered that the section gave power to direct a sale after a decree for foreclosure had been made, being of opinion that the Court ought not, when a plaintiff had obtained a decree, to insist upon his proceeding against his will on a decree which he obtained for his own advantage, when he preferred a different course authorised by the Legislature (cf. *Cook* v. *Cholmondeley*, 5 W. R. 835). It will be observed that these remarks do not apply to such a case as *Campbell* v. *Moxhay*, l. c., where the party applying had not the

carriage of the suit. As to the form of the decree for sale under this section, see *Staines* v. *Rudlin*, 16 Jur. 965 ; *Cator* v. *Reeves*, 16 Jur. 1004 ; Seton, p. 365. 15 & 16 Vict. c. 86, s. 48.

(*x*) The deposit must be enough "to meet at a rough estimate the possible expenses of an abortive attempt at a sale" (*Bellamy* v. *Cockle*, 2 W. R. 326) ; see *Corsellis* v. *Patman*, 4 L. R. Eq. 156 ; and a reserved bidding will be fixed sufficient to cover the sum found due to the mortgagee (*Whitfield* v. *Roberts*, 7 W. R. 216) ; and when the mortgagor declined to deposit 100*l.*, an order for foreclosure was made (*Boydell* v. *Manby*, 9 Hare, App. liii.). As a general rule the conduct of the sale, even when it is asked for by the second mortgagee, will be given to the first (*Hewitt* v. *Nanson*, 7 W. R. 5). Deposit when sale ordered without consent of mortgagee.

XLIX. No suit in the said court shall be dismissed by reason only of the misjoinder (*y*) of persons as plaintiffs therein (*z*), but wherever it shall appear to the Court that, notwithstanding the conflict of interest in the co-plaintiffs, or the want of interest in some of the plaintiffs, or the existence of some ground of defence affecting some or one of the plaintiffs, the plaintiffs, or some or one of them, are or is entitled to relief, the Court shall have power to grant such relief, and to modify its decree according to the special circumstances of the case, and for that purpose to direct such amendments, if any, as may be necessary, and at the hearing, before such amendments are made, to treat any one or more of the plaintiffs as if he or they was or were a defendant or defendants in the suit, and the remaining or other plaintiff or plaintiffs was or were the only plaintiff or plaintiffs on the record ; and where there is a misjoinder of plaintiffs, and the plaintiff having an interest shall have died leaving a plaintiff on the record without an interest, the Court may, at the hearing of the cause, order the cause to stand revived as may appear just, and proceed to a decision of the cause if it shall see fit, and to give such directions, as to costs or otherwise, as may appear just and expedient. Suit not to be dismissed for misjoinder of plaintiffs, but Court may modify its decree according to special circumstances.

(*y*) As to misjoinder, vid. Mitf. on Pleading, 399 ; Daniell, 226. Before the Act misjoinder was a ground for demurrer (*Cuff* v. *Platell*, 4 Russ. 242), or for a plea (*King of Spain* v. *Machado*, 4 Russ. 225 ; *Makepeace* v. *Haythorne*, *ibid.* 244), as the case might be. Misjoinder.

(*z*) The section applies to a plaintiff suing on behalf of himself and others. Thus, where on a bill by one member of a company on behalf of himself and all others except the defendants, praying an account of the receipts and payments of the defendants on behalf of the company, and the payment of what should be found due to the plaintiff, it appeared that, owing to certain circumstances, the interests of some of the persons represented by the plaintiff were Suit by plaintiff on behalf of himself and others.

15 & 16 Vict. c. 86, s. 49.

different from his, it was held, that the case was within this section, and that the Court might treat the absent plaintiffs as defendants, and might determine whether a decree should be made (*Clements* v. *Bowes*, 1 Drew. 684, 694). In this case the Court directed the plaintiffs, having conflicting interests, to be served with and to have liberty to attend the proceedings on taking the accounts directed (*ibid.*). See, too, *Beeching* v. *Lloyd*, 3 Drew. 227; *Evans* v. *Coventry*, *ibid.* 75; on appeal, 5 D. M. G. 911, 918; *Stupart* v. *Arrowsmith*, 3 Sm. & G. 176.

A bill by a wife suing by her next friend in respect of her separate estate is not demurrable because the husband, having no adverse interest, joins as a co-plaintiff, *Beardmore* v. *Gregory*, 2 H. & M. 491.

The section is imperative that a bill shall not be dismissed for misjoinder (*Clements* v. *Bowes*, l. c.). But see *Barton* v. *Barton*, 3 K. & J. 512.

Suit by plaintiff filling two characters.

Where a testatrix gave property to her two daughters, and made one of them her executrix, and the two daughters created an equitable mortgage of part of the real estate, partly for the purpose of paying the debts of the testatrix, and partly for their private purposes, and the daughter who was executrix died, having appointed as her executrix the other daughter, who filed a bill against the equitable mortgagees to have the title-deeds of the estate delivered up, it was held that the case was within this section, and that the plaintiff might file the bill in her character of representative both of the daughter and of the mother (*Carter* v. *Sanders*, 2 Dr. 248, *qu. vid.*). See also, as to misjoinder since the Act, *Williams* v. *Page*, 24 Beav. 669; *Barton* v. *Barton*, 3 K. & J. 512.

Suit by husband and wife.

Where a bill is filed by a husband and wife to set aside an appointment made by the wife on the ground that her execution was fraudulently obtained, this is not merely a case of misjoinder which can be cured under this section, and the bill must be amended by making it the bill of the wife by her next friend (*Hope* v. *Fox*, 1 J. & H. 456; *Smith* v. *Etches*, 1 H. & M. 558).

No suit to be objected to if only declaratory order sought.

L. No suit (*a*) in the said court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby (*b*), and it shall be lawful for the Court to make binding declarations of right without granting consequential relief (*c*).

Petition under Trustee relief Act.

(*a*) A petition under the Trustee Relief Act is within the section (*Re Walker*, 16 Jur. 1154, cited p. 71, *ante*, and see sect. 30 of "Trustee Act, 1850"). But see *Sharshaw* v. *Gibbs*, Kay, 333.

(*b*) This could not be done under the old law (see *Grove* v. *Bastard*, 2 Phil. 622).

"Consequential relief."

(*c*) Where a declaration is asked and also an injunction, such injunction is consequential relief (*Marsh* v. *Keith*, 1 Drew. & Sm. 342).

No power under section to declare future rights.

The tendency of the later decisions on this section has been considerably to restrict its operation. Thus, notwithstanding the earlier cases of *Fletcher* v. *Rogers*, 10 Hare, App. xiii., and *Wright* v. *King*, 18 Beav. 461, it was held by Lord Justice Turner (Lord Justice Knight Bruce abstaining from giving an opinion), that it gave the Court no power to declare *future rights* (*Lady Langdale* v. *Briggs*, 8 D. M. G. 391); see the case before the court below, 3 Sm. & G. 245; comp. *Burt* v. *Sturt*, 1 W. R. 145; *Greenwood* v. *Sutherland*, 10 Hare, App. xii., and *Garlick* v. *Lawson*, *ibid.* xv., where the Court, in a special case, refused to make a binding declaration under this section as to the interests of parties entitled in reversion. See, also, *Gosling* v. *Gosling*, 1 Jo. 265; *Fyfe* v. *Arbuthnot*, 1 De G. & J. 406; *Bell* v. *Cade*, 10 W. R. 38.

Or to bind infants.

When some of the parties were infants, and therefore unable to bind themselves, it was held that the Court had no power, even by consent, to decide a purely legal question, so as to bind the infants (*Webb* v. *Byng*, 8 D. M. G. 633). Where, however, a lessee prayed a declaration of her right to claim a renewal of the lease at the expiration of the term, and also prayed that a railway com-

pany might be ordered to compensate her on the footing of such right, a demurrer to the bill on the ground that her right (if any) was *in futuro*, was overruled, *Bogg* v. *Midland Railway Company*, 2 W. N. (1867), 98. 15 & 16 Vict. c. 86, s. 50.

Nor will the section entitle a party to a prospective declaration guarding against a claim which may never be made. Thus, when a lease was granted to two partners, the covenants being only joint at law, and the representative of one partner deceased filed a bill against the lessor, alleging that he claimed a right under the covenants if a breach should arise, and praying a declaration that he had no such right, notwithstanding the section, the demurrer was allowed (*Jackson* v. *Turnley*, 1 Drew. 617, *qu. vid.*); and it seems the section does not apply, unless the plaintiff would be entitled to consequential equitable relief if he chose to ask it (*Rooke* v. *Lord Kensington*, 2 K. & J. 753; *Jackson* v. *Turnley*, l. c.). Nor, it seems, can the Court, under this section, make a decree declaratory of a merely legal right (*Trustees of the Birkenhead Docks* v. *Laird*, 4 D. M. G. 732, 738; see, too, *Bristow* v. *Whitmore*, 4 K. & J. 743; *Norman* v. *Johnson*, 8 W. R. 300; and see as to the decision of questions of law arising in a suit, ss. 61, 62, *post*, p. 224, and note (*d*) to sect. 3 of Lord Cairns' Act, p. 264, *post*. Court will not make order guarding against claim which may not arise. Nor declaration of legal right.

In *Byam* v. *Byam* (19 Beav. 58), the Court, to save expense, made a declaration respecting the construction of certain marriage articles, instead of directing a settlement. Comp. *Wright* v. *King*, 18 Beav. 461, where a similar course was adopted in the case of a ward of Court whose fortune was small. In *Hope* v. *Hope*, 4 D. M. G. 328, a declaration upon a point of English law was made for the information of a foreign court. Compare note (*d*) to sect. 3 of Lord Cairns' Act, p. 264, *post*. When Court makes declaration to save expenses, &c.

For cases where a small settlement has been made for the purpose of raising a question as to legitimacy and getting a declaratory decree, see *Gurney* v. *Gurney*, 1 H. & M. 413; *Anon.*, 2 H. & M. 124. Fictitious suit.

LI. It shall be lawful for the Court to adjudicate on questions arising between parties (*d*), notwithstanding that they may be some only of the parties interested in the property respecting which the question may have arisen, or that the property in question is comprised with other property in the same settlement, will, or other instrument, without making the other parties interested in the property respecting which the question may have arisen, or interested under the same settlement, will, or other instrument, parties to the suit, and without requiring the whole trusts and purposes of the settlement, will, or other instrument, to be executed under the direction of the Court, and without taking the accounts of the trustees or other accounting parties, or ascertaining the particulars or amount of the property touching which the question or questions may have arisen (*e*): Provided always, that if the Court shall be of opinion that the application is fraudulent or collusive, or for some other reason ought not to be entertained, it shall have power to refuse to make the order prayed. Court may decide between some of the parties without making others interested parties to the suit. Proviso.

15 & 16 Vict. c. 86, s. 51.

(*d*) This section was held to apply to a petition under the Trustee Act, 1850, presented by some only of the persons beneficially interested in a trust fund (*Re Sharpley*, 1 W. R. 271; see note (*a*), p. 104, *ante*; and to a special case, *Re Brown*, 29 Beav. 401); see note (*b*), p. 118, *ante*.

Petitions and special cases.

Interest of absent persons must be represented.

(*e*) The section only applies when some of the persons interested in the question at issue, *in every point of view*, are before the Court (*Swallow* v. *Binns*, 9 Hare, App. xlvii.). Thus, when the question was between the claims of the surviving children, and the representatives of deceased children under a settlement, the Court refused to proceed in the absence of any party representing the interests of the deceased children (*ibid.*). A party will not be allowed to proceed with the case under this section by striking the names of some of the defendants (who are out of the jurisdiction) out of the record, and proceeding without them (*Lanham* v. *Pirie*, 2 Jur. N. S. 1201; and see cases cited under sect. 44, *supra*).

Decree does not bind them.

It must be remembered that the section does not render the decree of the Court binding on the absent parties, as the 42nd section of the Act does, when notice of the decree has been served upon them under the 8th rule (*Doody* v. *Higgins*, 9 Hare, App. xxxii.).

Partial administration.

This section enables the Court to direct the administration of one or more specific trusts created by an instrument without directing the performance of all (*Parnell* v. *Hingston*, 3 Sm. & G. 337; *Prentice* v. *Prentice*, 10 Hare, App. xxiii.).

But it does not enable the Court to make a decree for foreclosure or for sale in the absence of a party entitled to one-third of the equity of redemption, *Caddick* v. *Cook*, 32 Beav. 70.

In case of abatement, &c., of suit an order may be made, which shall have same effect as a bill of revivor.

LII. Upon any suit (*f*) in the said court becoming abated (*g*) by death, marriage, or otherwise, or defective by reason of some change or transmission of interest or liability (*h*), it shall not be necessary to exhibit any bill of revivor or supplemental bill in order to obtain the usual order to revive such suit, or the usual or necessary decree or order to carry on the proceedings (*i*); but an order to the effect of the usual order to revive or of the usual supplemental decree may be obtained as of course (*k*) upon an allegation of the abatement of such suit, or of the same having become defective, and of the change or transmission of interest or liability; and an order so obtained, when served (*l*) upon the party or parties who according to the present practice of the said court would be defendant or defendants to the bill of revivor or supplemental bill, shall from the time of such service be binding on such party or parties in the same manner in every respect as if such order had been regularly obtained according to the existing practice of the said court; and such party or parties shall thenceforth become a party or parties to the suit, and shall be bound to enter an appearance thereto (*m*) in the office of the clerks of records and writs, within such time and in like manner as if he or

they had been duly served with process to appear to a bill of revivor or supplemental bill filed against him; provided that it shall be open to the party or parties so served, within such time after service as shall be in that behalf prescribed by any general order of the Lord Chancellor (*n*), to apply to the Court by motion or petition to discharge such order on any ground which would have been open to him on a bill of revivor or supplemental bill, stating the previous proceedings in the suit and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon: Provided also, that if any party so served shall be under any disability other than coverture, such order shall be of no force or effect as against such party until a guardian or guardians *ad litem* shall have been duly appointed for such party, and such time shall have been elapsed thereafter as shall be prescribed by any general order of the Lord Chancellor in that behalf (*o*). 15 & 16 Vict. c. 86, s. 52.

(*f*) For forms of orders, see Pemberton on Revivor, 111.

The section applies to suits commenced before the Act came into operation (*Lowes* v. *Lowes*, 1 W. R. 14; cf. *Jones* v. *Woods*, 20 L. T. 50); and even to cases where the abatement took place before that period (*ibid.*). A special case is within the section (*Wilson* v. *Whateley*, 1 Jo. & H. 331; comp. *Ainsworth* v. *Alman*, 14 Beav. 597; *Re Brown*, 29 Beav. 401). And so are petitions, *Re Nicholson*, 29 Beav. 665; *Re Waugh*, *ibid.* 666; *Re Staggoll*, 15 W. R. 974. What proceedings can be revived. Petitions.

And a reference of a solicitor's bill for taxation may be revived, see *ante*, note (*m*), p. 17. Reference for taxation.

The party against whose representatives the suit is sought to be revived, must have *appeared*, *Crowfoot* v. *Munder*, 9 Sim. 306; *Bland* v. *Davison*, 21 Beav. 312; *Williams* v. *Jackson*, 7 W. R. 104. No order—(1) When original party has not appeared;

And as to the Statute of Limitations being a bar to revivor, see *Bland* v. *Davidson*, 21 Beav. 312; *Dunne* v. *Doyle*, 10 Ir. Exch. Rep. 502.

Even when a decree for account has been made, the Court has a discretion to refuse the order on account of laches, *Alsop* v. *Bell*, 24 Beav. 451; *Higgins* v. *Shaw*, 2 Dr. & W. 356. The objection of lapse of time does not appear to have been taken in *Deeks* v. *Stanhope*, 1 Jur. 413. (2) when barred by Statute of Limitations.

(*g*) The section applies to abatement either before or after decree, 10 Hare, App. lxxii., correcting *ibid.* xxxi. Who may apply

When the abatement is before decree, only the plaintiff can obtain the order; and a defendant, or the representatives of a deceased defendant, can only move that in default of revivor the bill be dismissed, Ord. XXXII. 4, *post*. (1) Before decree; plaintiff or creditor.

A creditor who in a creditor's suit has proved a debt on the estate, is considered a plaintiff for the purpose of reviving, *English* v. *Hayman*, 9 Hare, App. lxxxviii.; *Lowes* v. *Lowes*, 2 D. M. G. 784; though the certificate allowing his debt is not signed, *Inchley* v. *Allsop*, 9 W. R. 349.

When the suit abates after decree, any defendant who has an interest therein may revive on the plaintiff's neglecting to do so; but if a defendant desires not only to revive, but also to get the *conduct of the suit*, he must give notice of his motion, *Noble* v. *Stow*, 30 Beav. 512 (and see remarks on that case in Pemberton, 81), *Stratford* v. *Baker*, 2 W. N. (1867), 148. (2) After decree; plaintiff or defendant. Noble *v.* Stow.

15 & 16 Vict. c. 86, s. 52.

When the suit abates between the hearing and decree, judgment may be given without reviving, *Collinson* v. *Lister*, 20 Beav. 355; *Boucicault* v. *Delafield*, 12 W. R. 8; *Belsham* v. *Perceval*, 8 Hare, 157. And where an issue had been directed, and the plaintiff was dead, but not known to be so when it was tried, it was no ground for a new issue. So a decree may be drawn up though the suit has abated since it was pronounced, *Willimott* v. *Ogilby*, Seton, 1139; and see *Rucker* v. *Scholefield*, 1 N. R. 180; where a statement was inserted that the Court proceeded in the absence of a personal representative (compare sect. 44, and note (*t*), *ante*, p. 200).

Between hearing and decree revivor not necessary.

What is abatement.

No abatement takes place where the deceased plaintiff was one of several co-plaintiffs representing a class under sect. 42 of this Act, *Hinde* v. *Morton*, 2 H. & M. 368 (where *Hall* v. *Clive*, 20 Beav. 575; *Smith* v. *Horsfall*, 24 Beav. 331; *Ure* v. *Lord*, 2 Dr. & Sm. 263, were not followed).

Where the plaintiff in an administration suit, who was beneficially entitled, died, and the estate was known to be insolvent, so that his representatives would take no benefit, an order of revivor was made, dispensing conditionally with the presence of the plaintiff's representatives, *Leycester* v. *Norris*, 13 W. R. 201; and see sect. 44, *supra*.

(A) What changes of interest are within the section—

(*h*) Supposing the original party to have duly appeared;

(A) The section applies to the following changes of interest: —

(1) transfers by operation of law:

(1) Where the interest of such party to the suit is transferred by mere operation of law, *e.g.* on marriage of female plaintiff or defendant, see *Rudge* v. *Weedon*, 4 De G. & J. 216, 7 W. R. 519, reversing s. c. 7 W. R. 393 (where a protection order under 20 & 21 Vict. c. 85, was set aside), and a sole female plaintiff entitled for her separate use was allowed on her marriage the common order to revive by her next friend against her husband, *Trezevant* v. *Broughton*, 5 W. R. 517; and see *Powell* v. *Heather*, 1 L. T. N. S. 479.

(*a*) descent.

So on the death of any party to the suit, and consequent transmission of his interest to his legal representative, *Ward* v. *Shakeshaft*, 1 Dr. & Sm. 607; *Flockton* v. *Slee*, 7 W. R. 393; *Fane* v. *Richards*, 11 W. R. 524; see, too, *Barber* v. *Walker*, 15 W. R. 728; *Joyce* v. *Rawlins*, 14 W. R. 785; but see *Wright* v. *Wilkin*, 11 W. R. 851.

Except where suit was supplemental.

Where the intestate was sole plaintiff in a *supplemental* suit, a bill was held to be necessary, *Brooke* v. *Brooke*, 9 W. R. 804. See as to revivor by executors, Williams, 1763.

Executors to admit assets:

Where the object of the party reviving the suit against executors is not only to cure the abatement, but to get the benefit of any accounts directed against the deceased party, and to continue them against his representative, an order will be made on motion under the section that the executors do admit assets, or in default that an account be taken, *Edwards* v. *Batley*, 19 Beav. 457; *Cartwright* v. *Shepherd*, 20 Beav. 122, overruling *Dean and Chapter of Ely* v. *Edwards*, 22 L. J. Ch. 629, where it was said that to get such an order a bill must be filed. But where the original bill was for specific performance, it seems that a supplemental bill against the executors of a deceased defendant is proper, *Collard* v. *Roe*, 1 Giff. 311; Pemberton, 124.

(β) bankruptcy;

So, too, on the bankruptcy of any party to the suit, bankruptcy being a simple transmission of interest by Act of Parliament, a common order to revive against his assignees can be obtained, *Macdonald* v. *Macfarlane*, 6 W. R. 245; *Lash* v. *Miller*, 4 D. M. G. 841; *Kitchin* v. *Himble*, 10 W. R. 686; *Jackson* v. *Riga Railway Company*, 28 Beav. 75; *Cochrane* v. *Phillips*, 3 W. R. 461; and on the annulment of a bankruptcy, the suit can be revived by common order against the late bankrupt, *Mostyn* v. *Emmanuel*, 5 N. R. 464.

No order is necessary on the change of the assignees of a bankrupt *plaintiff*, see 12 & 13 Vict. c. 106, s. 157 (unrepealed); *Gordon* v. *Jesson*, 16 Beav. 440; *Man* v. *Ricketts*, 1 Ph. 617.

As to revivor for costs on bankruptcy of party liable to pay, see note (*i*), *ad finem*, p. 215.

assignment for benefit of creditors;

So where a plaintiff assigned his property for the benefit of creditors, a common order to make the inspectors parties was made under the section on the ground that the operation of the assignment was *dehors* the jurisdiction of the Court of Chancery, and therefore, so far as the Court was concerned, it was equivalent to a transmission of interest by operation of law,

15 & 16 Vict. c. 86, s. 52.

Croskey v. *European Steam Company*, 1 W. N. (1866), 23, 70. See, too, *Perez* v. *Pinto*, cited in Pemberton, p. 145; *Overman* v. *Overman*, 12 Jur. 326.

So, on the lunacy of a plaintiff, his committee may revive by a common order in Chancery, *Dangar* v. *Stewart*, 9 W. R. 266; *Simpson* v. *London and North-Western Railway Company*, 11 W. R. 558.

(γ) lunacy.

Operation of foreign law.

But a suit cannot be revived under this section against a curator in whom a plaintiff's estate is vested by the law of a *foreign* country, *Gillon* v. *Rotch*, 1 Dr. & Sm. 621.

(2) New party coming into existence.

(2) Where a change of interest has taken place by a necessary party coming into existence during the pendency of the suit, *Fullerton* v. *Martin*, 1 Drew. 238; *Phippen* v. *Brown*, 1 Jur. N. S. 698; *Pickford* v. *Brown*, 1 K. & J. 643; *Creswell* v. *Bateman*, 6 W. R. 220; and see *Jebb* v. *Tugwell*, 20 Beav. 461 (where a supplemental order was made binding the interest of an infant born before decree, but by inadvertence not made a party before decree, it appearing that it would be for his benefit); and compare *Barrett* v. *White*, 3 W. R. 526; *Notley* v. *Palmer*, *ibid.* 201; see, however, *Garrett* v. *Lancefield*, 11 W. R. 869; and for form of order generally in case of infant, see Seton, 1166, form 9; and compare note (*p*), p. 217, *post*, as to amendment by adding parties.

Infant only bound where for his benefit.

(3) Assignment (not being sole plaintiff's whole interest).

(3) Where there has been an assignment of interest by a party to the suit, not being an assignment by sole plaintiff of his entire interest.

(α) Devise by defendant.

(α) *E. g.*, on a devise by a defendant, in which case, under the old practice, a plaintiff might continue his suit by a supplemental bill, simply putting in issue the assignment; and so, in *Lowe* v. *Watson*, 1 Sm. & Giff. 123, where a defendant to a creditor's suit, who was heir at law to the testator, died devising the real estate to his son on trust to sell, and out of the proceeds to pay a legacy to his executors, it was held that the plaintiff might obtain the common order under the statute to revive against the devisee and executor of the heir at law. See, too, *Hall* v. *Clive*, 20 Beav. 575.

(β) Settlement.

So, on a settlement being made (see *Atkinson* v. *Parker*, 2 D. M. G. 221), where a female ward of Court married without the leave of the Court, and the trustees of the settlement were made parties to a suit in which she was plaintiff by the common order.

(γ) Appointment of new trustee.

And see *Williamson* v. *Jefferys*, 12 W. R. 403, where a plaintiff trustee retired from the trusts after decree, and new trustees were appointed on further consideration, and the suit was revived on the motion of the continuing trustees, who were defendants, that they should carry on the suit as plaintiffs.

(δ) Mortgage.

So, on a mortgage by any party to the suit, the mortgagee or incumbrancer may be brought before the Court by a common order, *Brandon* v. *Brandon*, 3 N. R. 287; see *Freeman* v. *Pennington*, 3 D. F. J. 295.

Except where frame of suit is to be altered.

But the common order *may* be refused in cases where the revivor will alter the frame of the suit, *e. g.*, where a co-plaintiff is placed in such a position that he ought to be a defendant (*Jervoise* v. *Clark*, 2 W. R. 337, in which case a supplemental bill was held necessary; and comp. *Montefiore* v. *Guedalla*, 8 W. R. 53, where a question had in the course of the suit arisen between co-plaintiffs, and a supplemental bill was held necessary). So again, when one of two creditors, plaintiffs in a creditor's administration suit, upon an abatement by the death of an executor of the testator, obtained letters of administration *de bonis non* to the testator's estate, it was held that a suit could not be revived against him under the section (*Tate* v. *Leithead*, 9 Hare, App. li.; but see *Cresswell* v. *Bateman*, 6 W. R. 220). Where, however, there is a sole plaintiff and a sole defendant, and the defendant dies having appointed the plaintiff his executor, the latter may obtain an order to revive the suit against the persons beneficially interested, who have been summoned to attend the proceedings in chambers (*Pedder* v. *Pedder*, 8 W. R. 16; but see *Dobson* v. *Faithwaite*, 10 W. R. 29); and see the remarks of Pemberton on Revivor, p. 120. *Foster* v. *Bonner*, 33 L. J. Ch. 384, did not follow *Jervoise* v. *Clark*.

But the Court exercises discretion.

The Court exercises a discretion according to the special circumstances, and sometimes after decree, or where the rights of the parties have been ascertained, an order under the statute will be permitted; but the fact of a decree having been made will not of itself be sufficient ground for the order, *Tate* v. *Leithead* (l. c.); thus, where an administration bill was filed by plaintiffs believing

15 & 16 Vict. c. 86, s. 52.

themselves to be next of kin, but after decree it turned out that another person was next of kin, it was held that the suit could not be continued, and the conduct of the cause given to the new plaintiffs without a fresh bill being filed, *Lawrence* v. *Maule*, 3 N. R. 239.

(B) What changes of interest are not within the section.

(B) In cases where an order of revivor cannot be obtained under this section, a suit can only be revived against new parties by supplemental bill, see note (*q*) p. 218.

Where interest of *sole plaintiff* determines.

The section has been generally held not to apply to cases where a sole plaintiff has wholly determined by devise or assignment or otherwise, but lately the scope of the Act has been extended, and the courts lean towards making the common order in such cases, if possible. The next section as to amendment does not apply to such cases, *Beardmore* v. *Gregory*, 2 H. & M. 496.

(α) devise of sole plaintiff.

Thus, a supplemental bill was held necessary in order to revive the suit where a sole plaintiff died devising his whole interest, because the title of the devisee might be litigated in the Court of Chancery; so that he must establish his rights by bill in order to have the benefit of the former proceedings, *Dendy* v. *Dendy*, 5 W. R. 221; *Williams* v. *Williams*, 9 W. R. 226; *Laurie* v. *Crush*, 32 Beav. 117.

(β) Assignment of sole plaintiff.

So, where the sole plaintiff assigned his interest *inter vivos*, V.-C. Wood observed that the title of the assignee might be litigated in that very suit, and in order to revive he must file a bill, *Greenhalgh* v. *Rumney*, 5 N. R. 463.

(γ) Succession of sole plaintiff.

And similarly, where the sole plaintiff's interest determined by death or otherwise, because the person succeeding would have an entirely new right of action, and the defendants might raise a new defence, *Pownend* v. *Toker*, 14 W. R. 300; so where an ecclesiastical person succeeded to a benefice, or a remainderman in a settlement became entitled on the death of a tenant for life, *Watts* v. *Watts*, Johnson, 631; *Dobson* v. *Faithwaite*, 30 Beav. 228; *Wordsworth* v. *Parkins*, 12 W. R. 120; but a remainderman coming in on the determination of an estate tail was always within the section, because a plaintiff tenant in tail was supposed to represent the inheritance, and all claiming in remainder, *Lloyd* v. *Johnes*, 9 Ves. 58; and see *Winter* v. *Stahle*, 3 W. R. 580.

Except after estate tail.

Liberal construction in later cases.

But lately a liberal construction has been put on the section, and the common order has been made in cases where a sole plaintiff's interest has wholly determined, subject, however, to the right of any person contesting the title of his assignee or successor to move to discharge the order, *Eyre* v. *Brett*, 34 Beav. 441; *Colyer* v. *Colyer*, 1 L. R. Ch. 482; and see remarks on *Colyer* v. *Colyer*, in Pemberton, 37, 57; *Mallock* v. *Still*, 15 W. R. 293; *Hobson* v. *Seawood*, 15 W. R. 887.

So where a sole plaintiff died before an answer had been put in to his interrogatories, his heir and executor was allowed to revive, and as the time for answering had expired, the Court also ordered that the defendant should within twenty-eight days answer the interrogatories, *Earl Beauchamp* v. *Winn*, 2 L. R. Eq. 302.

Where the interest of a sole defendant determined by his death, the common order was made to revive against his devisee, *Earl Durham* v. *Legard*, 34 Beav. 442; *Bedford* v. *Bedford*, cited in note thereto.

Supplemental bill.

If a supplemental bill is necessary, see, as to the proper parties, *Wilkinson* v. *Fowkes*, 9 Hare, 193; and generally, Daniell, 1405.

New parties bound by *future* proceedings;

(*i*) Even where some proceedings have been taken in the suit in ignorance of the abatement, an order can be obtained directing that future proceedings shall be carried on against the new parties, see *Freeman* v. *Pennington*, 3 D. F. J. 295, overruling *Wilson* v. *Auchterloney*, 1 W. R. 34; and see remarks in Pemberton, pp. 50, 151.

Where a defendant had appeared but not answered, and then became bankrupt, an order was made to revive against his assignees without prejudice to their putting in an answer, *Kitchin* v. *Humble*, 10 W. R. 686; and see *Earl Beauchamp* v. *Winn*, 2 L. R. Eq. 302.

by *past* proceedings.

The Court has also jurisdiction in such cases to affirm past proceedings, *Houston* v. *Briscoe*, 7 W. R. 394; but the new parties are of course only bound by the order as to past proceedings where they consent, *ibid.*, *Smith* v. *Horsfall*, 24 Beav. 331; or in the case of infants, where the Court considers it to be for their benefit (see last page). If the common order is made in such

a case, liberty will be reserved to the new party to discharge it if it is objectionable for any reason, *Fenton* v. *Hawkins*, 4 N. R. 54. 15 & 16 Vict. c. 86, s. 52.

As a general rule there can be no revivor for costs after an abatement caused by *death* (*Morgan* v. *Scudamore*, 2 Ves. Jr. 313; *Andrews* v. *Lockwood*, 15 Sim. 153; 2 Ph. 399); whether the abatement be caused by the death of the party to pay or the party to receive the costs (*Jupp* v. *Greening*, 5 Madd. 375); nor does the fact of the defendants being a corporate body (*Umphelby* v. *Waveney Valley Railway Company*, 1 J. & H. 254; nor the fact that the bill specially prays costs (*ibid.*), nor that the case occurs since the 1 & 2 Vict. c. 110, s. 18, (p. 6, *ante*), *ibid.*; *Robertson* v. *Southgate*, 7 Hare, 109; nor that the party who has died without paying costs was one of several defendants, (*Bowyer* v. *Beamish*, 2 J. & H. 238), affect this rule. No revivor for costs *after death*.

Where the party to whom costs were payable died before taxation, the Court (the suit not having been revived) refused with costs a motion that the Master might proceed with the taxation (*Robertson* v. *Southgate*, 7 Hare, 109). But the survivors of several defendants, against whom a bill has been dismissed with costs, to be taxed, and paid by the plaintiff, are entitled to proceed with the taxation of their costs, notwithstanding the death of one of such defendants, without a revivor of the suit, and although the surviving defendants and the deceased, in his lifetime, had carried in a joint bill of costs for taxation *Hunter* v. *Daniel*, 7 Hare, 281; see, however, *Malins* v. *Greenway*, 7 Hare, 391; *Morgan* v. *Davey*, 384; Daniell, 1396. Nor for taxation of costs.

The exceptions to the rule are:

1. Where the costs have been taxed (*Lowten* v. *Mayor of Colchester*, 2 Merrivale, 113; overruling *Glenham* v. *Stutwell*, Dick. 14); or the taxation has been postponed, on an undertaking that the postponement shall be without prejudice (*Tucker* v. *Wilkins*, 7 Sim. 349). Exceptions to general rule.

2. Where the costs are directed to be paid out of the estate, *Jenour* v. *Jenour*, 10 Ves. 562), or out of a particular fund (*Kemp* v. *Makrell*, 2 Ves. Sen. 579; but see *Malins* v. *Greenway*, 7 Hare, 391, where a trustee who would have been entitled to his costs out of a fund in court, dying before a decree on further directions, was held to have no lien on the fund for such costs).

3. Where some obligation imposed upon the party liable for costs remains to be executed, *Bowyer* v. *Beamish*, 2 Jo. & Lat. 240; *Morgan* v. *Scudamore*, l. c.; *Johnson* v. *Peck*, 2 Ves. Sen. 465; *Kemp* v. *Makrell*, l. c.; and see *Fitzmaurice* v. *Sadlier*, 12 Ir. Eq. Rep. 136).

4. Where the costs are ordered to be paid by an officer of the court, *e.g.*, a receiver in the cause (*Betagh* v. *Concanon*, Ll. & G. temp. Plunket, 355).

It is now settled that there may be revivor for costs after the *bankruptcy* of a party liable to pay them, *Ellison* v. *Sharp*, 2 L. R. Ch. 355,; following *Farrall* v. *Davenport*, V.-C. S. 3 L. R. Eq. 473; and overruling *Boucicault* v. *Delafield*, 12 W. R. 1025; 13 W. R. 64. Revivor for costs *after bankruptcy*.

(*k*) The common order to revive is obtained by motion or petition, of course (*Boufil* v. *Purchas*, 1 W. R. 12), Pemberton, 111; nor need the allegation referred to in the statute be proved (*Gordon* v. *Jesson*, 16 Beav. 440; *Martin* v. *Hadlow*, 9 Hare, App. lii.); but where there are special circumstances arising out of the case, a special application to the Court is necessary (*Martin* v. *Hadlow*, l. c.; *Phippen* v. *Brown*, 1 Jur. N. S. 698; *Goodall* v. *Skerratt*, 1 Sm. & G. App. vii.); and see *Noble* v. *Stow*, cited in note (*g*), *supra*. If obtained *ex parte*, it is, of course, liable to be objected to by any parties to the suit (*Jackson* v. *Ward*, 1 Gif. 30); and if obtained on a false statement of facts, will be discharged as irregular (*Brignall* v. *Whitehead*, 30 Beav. 229). Common and special order to revive.

For an order that the suit be revived, and that defendant do answer interrogatories, see *Earl Beauchamp* v. *Winn*, 2 L. R. Eq. 302.

(*l*) The service should be on the defendants personally, but, where a defendant is out of the jurisdiction, an order may be obtained to substitute service on his solicitor (*Forster* v. *Menzies*, 10 Hare, App. xxxvi. n.; see *Scott* v. *Wheeler*, 13 Beav. 239; *Hart* v. *Tulk*, 6 Hare, 618; *Norton* v. *Hepworth*, 1 M. & G. 54). So where the defendants were very numerous service on their solicitors in the original suit was ordered, (*Morritt* v. *Walton*, 2 W. R. 643); but there is no authority for the doctrine sometimes laid down, that such substituted service may be made without applying to the Court. Where Service of order of revivor.

15 & 16 Vict. c. 86, s. 52.

subpœna to hear judgment had been served on a defendant, and the suit was revived on his bankruptcy against his assignees, a new subpœna was not required to be served on them (*Sparrow* v. *Ewing*, 14 W. R. 788). Where an estate was vested in trustees for sale, the Court held that service on the trustees was sufficient, without serving the parties beneficially interested (*Grimston* v. *Oxlay*, 1 W. R. 100).

Party served becoming defendant.

Appearance on revivor.

(*m*) In *Hanbury* v. *Ward*, 18 Jur. 222; and *Ward* v. *Cartwright*, 10 Hare, App. lxxiii.; it seems to have been thought unnecessary for a defendant to enter an appearance to an order of revivor obtained under this section. But in *Cross* v. *Thomas*, 16 Beav. 592; and *Forster* v. *Menzies*, 10 Hare, App. xxxvi. n., leave was given to enter an appearance for a defendant who had not appeared under Ord. X., 4 (*post*). But these cases were exceptional (see Pemberton on Revivor, 113); and generally, it is unnecessary for a defendant to appear to an order for revivor if they have already appeared to the original suit, *Hall* v. *Radcliffe*, 2 J. & H. 765; but see Daniell, 496.

Answer, interrogatories, &c., on revivor.

Executors, against whom an order had been obtained under this section, were held entitled to answer (*Martin* v. *Purnell*, 3 W. R. 395); and it seems that interrogatories may be filed on such an order (*Anon.*, 25 L. T. 61). A suit revived under this statute is to be considered a new suit so far as to entitle the defendant to move that the plaintiff (if resident out of the jurisdiction) do give security for costs (*Jackson* v. *Davenport*, 29 Beav. 212).

Time to discharge order.

(*n*) See Ord. XXXII. 1, which limits the time to twelve days. An application to discharge the order after six months had elapsed was refused, with costs (*Deeks* v. *Stanhope*, 1 Jur. N. S. 413).

Form of order.

(*o*) See Ord. XXXII. 1 *et seqq.*

For forms of order under this section, see *Dean and Chapter of Ely* v. *Hensly*, 1 W. R. 190; and Seton, p. 1164; Pemberton on Revivor and Supplement, 108 *et seq.*

New facts, &c., after commencement of suit to be introduced as amendments to bill, &c.

LIII. It shall not be necessary to exhibit any supplemental bill in the said court for the purpose only of stating or putting in issue facts or circumstances which may have occurred after the institution of any suit; but such facts or circumstances may be introduced by way of amendment (*p*) into the original bill of complaint in the suit if the cause is otherwise in such a state as to allow of an amendment being made in the bill, and if not, the plaintiff shall be at liberty to state such facts or circumstances on the record, in such manner and subject to such rules and regulations with respect to the proof thereof, and the affording the defendant leave and opportunity of answering and meeting the same as shall in that behalf be prescribed by any general order of the Lord Chancellor (*q*).

[Supplemental statement.]

Effect of amendment.

(*p*) As to amendment of petitions, see note to Ord. XXXIV., and as to the effect of amendment on injunctions, notices of motion, &c., note to Ord. IX. 8, *post*.

Amendment *after decree* by supplemental bill.

The section only applies to *amendments before decree*. After decree they must be introduced by supplemental bill, see note (*a*) to Ord. XXXI., and *Commerell* v. *Hall*, 2 Drew. 194.

Facts newly *discovered* introduced.

Not only facts which have occurred, but facts which have been discovered since the institution of the suit, may be introduced by amendment, *Bolton* v. *Ridsdale*, 2 W. R. 488, overruling s. c. *ibid.* 451.

A plaintiff whose title was defective at first, may not by amendment intro-

duce matter to cure such defect, *Att.-Gen.* v. *Portreeve of Avon*, 11 W. R. 1050; *Godfrey* v. *Tucker*, 33 Beav. 280. Nor may he add or strike out a prayer for relief after answer, *Butterworth* v. *Bailey*, 15 Ves. 358; *Lord Cholmondeley* v. *Lord Clinton*, 2 V. & B. 113; but see *Severn* v. *Fletcher*, 5 Sim. 457. 15 & 16 Vict. c. 86, s. 53.

Nor may he introduce new charges or alter the nature of the suit by amendment, *Mollett* v. *Enequist*, 26 Beav. 466; *Dennison* v. *Curtis*, 11 L. T. N. S. 671; *Horton* v. *Brocklehurst*, 29 Beav. 503; even though new parties are added by amendment, *Mulligan* v. *Mitchell*, 1 M. & Cr. 433; *Gibson* v. *Ingo*, 5 Hare, 156; *Barlow* v. *McMurray*, 2 L. R. Eq. 420. Defective case not to be cured by amendment. Or nature of suit changed.

If a plaintiff introduces such amendments he will have to pay such costs as have been occasioned by his irregular proceedings, *Mavor* v. *Dry*, 2 Sim. & S. 113; *Parkes* v. *Nickson*, 4 Giff. 311; and as to asking for costs of improper amendments, see note (*i*) to Ord. XI. 7, *post*, and Morg. and Davey, 86; or the defendant may move that the amended bill may be taken off the file or the amendments struck out, the plaintiff paying the costs of the application, *Barlow* v. *McMurray*, 2 L. R. Eq. 420.

The section does not apply for the purpose of making persons parties who have become necessary parties in respect of new facts or changes of interest; this must be done by supplemental bill or order of revivor, *Commerell* v. *Hall*, 2 Drew. 194; *Webb* v. *Wardle*, 11 Jur. N. S. 278; *Nicholson* v. *Gibb*, 2 W. R. 337; but a merely formal party, *e. g.* the personal representative of a testator in the cause who has taken out administration since the bill was filed, may be added by amendment, *Beardmore* v. *Gregory*, 2 H. & M. 491; *Heath* v. *Lewis*, 2 W. R. 641; *Haldane* v. *Eckford*, 14 W. R. 306. Amendment as to parties. Not in respect of changes of interest.

Original defects in parties may be cured by amendment on motion or petition, without notice; thus, defendants may be added or plaintiffs may be added, or struck out, at any time before the setting down for hearing, *Hichens* v. *Congreve*, 1 Sim. 500, where it was done after answer; but if plaintiffs are *struck out* after any of the defendants have appeared, the continuing plaintiff must give security for costs, *Fellowes* v. *Deere*, 3 Beav. 353; *Drake* v. *Symes*, 3 D. F. J. 491 (where a plaintiff struck his own name out, and the bill was afterwards dismissed with costs, for want of prosecution), see note (*f*) to Ord. XL. 6, *post*. But an infant plaintiff, on coming of age, was allowed to become a defendant instead, *Bicknell* v. *Bicknell*, 32 Beav. 381; but the amendments must not contain new charges relating to such new parties, see cases cited above. Adding or striking out parties.

An order to amend a bill by making a defendant a co-plaintiff, is out of course, *Lock* v. *Bagley*, 1 W. N. (1866), 65.

A plaintiff may, in a proper case, obtain an order to add defendants even at the hearing; thus, a bill was allowed to be amended at the hearing by introducing a next friend on behalf of a plaintiff, a married woman, and by making an infant party a defendant, *Mendes* v. *Guedella* (2), 2 J. & H. 259; *Leyland* v. *Leyland*, *ibid*, 149. A mere clerical error in the names of defendants was allowed to be corrected without new service, *Barnes* v. *Ridgway*, 1 Sm. & G. App. xviii.; see Ord. IX. 9.

Sometimes the Court permits a cause to stand over at the hearing that the plaintiff may amend his bill, but not so as to allow him to make a new case, and as to what amendments will be allowed, see *Lord Darnley* v. *London, Chatham, and Dover Railway Company*, 1 D. J. S. 204; where the plaintiff prayed specific performance by the company of an agreement to make proper accommodation works such as should be defined in an award made by his surveyor; but the defendants contended that the award was made too late, and the Court held that the award had been made too late to be binding on the company, and that the title to relief on the agreement, independently of the award, was not put forward with sufficient distinctness to make it right to give relief on that footing; but they gave the plaintiff leave to withdraw replication and amend his bill, by putting in issue any claim founded on the original agreement. And L. J. Turner, after reviewing the cases of *Filkin* v. *Hill*, 2 P. W. 6, 4 Bro. P. C. 640; *Watts* v. *Hyde*, 2 Phil. 406; and *Palk* v. *Clinton*, 12 Ves. 48, said that, speaking generally, leave should be given to amend at the hearing, where matters connected with what is proposed to be introduced by amendment are already in issue, see *Childers* v. *Childers*, 1 De G. & J. 482. In *Knox* v. *Gye*, 12 W. R. 145, 1125, the Court Where cause allowed to stand over for amendment at hearing.

15 & 16 Vict. c. 86, s. 53.

refused permission to amend at the hearing, the amendment proposed being material, but allowed a supplemental bill to be filed.

Amendment at hearing.

And in *Gossip* v. *Wright*, 11 W. R. 632, where a mortgagor filed a bill to set aside a conditional sale with right of re-emption, and it was held a valid transaction, V.-C. Kindersley refused to allow him to amend at the hearing by alleging undervalue, or to dismiss the bill without prejudice to his filing another, see *Forbes* v. *Stevens*, 10 L. T. N. S. 491 ; *Clegg* v. *Rowland*, 3 L. R. Eq. 368, 374 ; *Hume* v. *Pocock*, 12 Jur. N. S. 223.

Supplemental statement.

(*q*) See Ord. XXXII. 2, *post*, which provides that where the suit is not in such a state as to allow of amendment, the plaintiff may file a supplemental statement.

Rarely filed.

Before decree.

After decree.

But a supplemental statement is but rarely filed (see Daniell, 1403), for the bill can generally be amended before decree, and after decree this section does not apply ; but a supplemental bill must be filed, see *Commerell* v. *Hall*, 2 Drew. 194.

Same rules apply as to amendments.

The same rules apply to a supplemental statement as to ordinary amendments. Thus, a suit cannot be revived against new parties by a supplemental statement, but only by order of revivor or supplemental bill, *Heath* v. *Chapman*, 1 W. R. 244 ; *Heath* v. *Lewis*, 18 Beav. 527.

Nor can a defendant file a supplemental statement any more than he can amend a plaintiff's bill (*Langdale* v. *Gill*, 1 Sm. & G. 24), even though he has the conduct of the suit, *Lee* v. *Lee*, 9 Hare, App. xci. ; though after decree he may revive against a plaintiff's representatives, note (*g*), p. 211, *ante*.

Where account required to be taken, Court may give special directions as to the mode of taking same.

LIV. (*r*) It shall be lawful for the Court, in any case where any account is required to be taken, to give such special directions (*s*), if any, as it may think fit with respect to the mode in which the account should be taken or vouched, and such special directions may be given, either by the decree or order directing such account, or by any subsequent order or orders, upon its appearing to the Court that the circumstances of the case are such as to require such special directions ; and particularly it shall be lawful for the Court, in cases where it shall think fit so to do, to direct that in taking the account the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as *primâ facie* evidence of the truth of the matters therein contained (*t*), with liberty to the parties interested to take such objections thereto as they may be advised.

(*r*) See as to accounts and inquiries in chambers, Ord. XXXV. 16, *post*, and note (*t*) thereto.

Applications under this section ought to be made in chambers, *Hardwick* v. *Wright*, 15 W. R. 953.

Section whether retrospective.

In *Lodge* v. *Prichard*, 1 Sm. & G., App. viii. ; 3 D. M. G. 906 ; it seems to have been thought that this section was not retrospective ; but in the latter case of *Ewart* v. *Williams*, 7 D. M. G. 68, it was held by Lord Justice Turner, affirming an order of V.-C. Kindersley, reported in 3 Drew. 21 (but *dissentiente* Lord Justice Knight Bruce), that it empowered the Court to give special directions as to the mode of taking an account, which, though not yet taken, had been directed by a decree made several years before the passing of this Act.

15 & 16 Vict. c. 86, s. 54.

(*s*) The chief clerk may not take books as *primâ facie* evidence without such order, *Cookes* v. *Cookes*, 11 W. R. 871 ; but where no order had been obtained under this section that books of accounts should be taken as *primâ facie* evidence, but the chief clerk, in taking the accounts, directed by an administration decree, had so admitted them and granted the certificate, the Lords Justices of Appeal refused an application to discharge the certificate, but without costs (*Newberry* v. *Benson*, 23 L. J. Ch. 1003) ; but a settled account is never disturbed in chambers, though the decree contains no direction on the subject, *Newen* v. *Wetten*, 31 Beav. 315 ; but see Daniell, 1152.

Special directions for taking accounts.

As to special directions for taking accounts before the Act, see *Millar* v. *Craig*, 6 Beav. 443 ; *Allfrey* v. *Allfrey*, 10 Beav. 353.

Books primâ facie evidence.

The meaning of the section is that, where vouchers have been lost, or accounts cannot be taken in the ordinary way, the Court may give special directions for the taking of such accounts, but such directions will not be given merely to save expense, or unless ordinary evidence cannot be obtained (*Lodge* v. *Prichard*, l. c.). The observations of V.-C. Kindersley, in *Ewart* v. *Williams*, l. c., must, therefore, be received with some qualification. See the remarks of Lord Justice Turner in that case on appeal, 7 D. M. G. 74, 75.

Where Court will and will not act under the section.

(*t*) Under this section, accounts taken in the Court of Chancery of Jamaica, in a suit instituted against executors in that island, were ordered to be taken as *primâ facie* evidence of the truth of the matters therein contained against the plaintiff, with liberty to him to surcharge and falsify (*Sleight* v. *Lawson*, 3 K. & J. 292. And see *Stainton* v. *Carron Company*, 24 Beav. 346). And where the books of a manufactory, of which the plaintiff was manager, were kept by the defendant, it was held by V.-C. Wood that the contents, though not binding on the plaintiff, might, as he had free access thereto, be taken as *primâ facie* evidence against him, with liberty to him to surcharge and falsify (*Ogden* v. *Battams*, 1 Jur. N. S. 791, *qu. vid.*). Accounts which went back nearly thirty years were ordered to be taken as *primâ facie* evidence as against *cestuis que trusts*, who had always had access to them, *Banks* v. *Cartwright*, 15 W. R. 417 ; and see *Hardwick* v. *Wright*, *ibid.* 953.

Entries by solicitor.

In *Morgan* v. *Higgins*, 5 Jur. N. S. 240, where a solicitor was ordered to deliver a bill of costs, an agreement for payment of a fixed sum being set aside, V.-C. Stuart refused to direct that entries made by him several years before, and contemporaneous with the transactions, should be taken as *primâ facie* evidence under this section (see *Coleman* v. *Mellersh*, 2 Mac. & G. 209 ; and as to limiting an account to a certain time, *Dean* v. *Thwaite*, 21 Beav. 621).

Court will not order annual rests.

When a decree for an account has been made against a mortgagee in possession without directing annual rests, the Court has no power under this section, or under Ord. XXXV. 19, to add to the decree by directing it to be taken with annual rests (*Nelson* v. *Booth*, 3 De G. & J. 119 ; and see note (*p*) to sect. 45, p. 303—4, *ante*.

Court may order real estate to be sold if required.

LV. (*u*) If after a suit shall have been instituted in the said court, in relation to any real estate, it shall appear to the Court that it will be necessary or expedient that the said real estate, or any part thereof, should be sold for the purposes of such suit (*v*), it shall be lawful for the said Court to direct the same to be sold at any time after the institution thereof (*w*), and such sale shall be as valid to all intents and purposes as if directed to be made by a decree or decretal order on the hearing of such cause ; and any party to the suit in possession of such estate, or in receipt of the rents and profits thereof, shall

15 & 16 Vict. c. 86, s. 55.

be compelled to deliver up such possession or receipt to the purchaser or such other person as the Court shall direct.

(*u*) As to sales under a decree, see Ord. XXXV. 13, *post*, and note (*x*), p. 158, *ante*. The application under this section should be made in chambers, *ante*, p. 147.

Section does not enable parties to obtain a decision of rights on interlocutory motion.

"This section is only applicable to cases in which, for the protection of property, or other like causes, it is necessary to apply to the Court to order a sale, see *Tulloch* v. *Tulloch*, 3 L. R. Eq. 574; and it was not intended to enable parties in a contested suit to obtain, upon an interlocutory application before the hearing, a decision upon the *questions in contest*" (*Prince* v. *Cooper*, 16 Beav. 546). And it seems that a sale will only be directed at once where, before the Act, it would have been directed at the hearing (*Mandeno* v. *Mandeno*, Kay, App. ii.; but comp. *Gladwin* v. *Gladwin*, 21 L. T. 98, where an order was made under the section to avoid the expense of a hearing on further consideration).

Infants.

(*v*) In a suit to carry the trusts of a will into execution, the Court may direct a sale to raise the costs of the suit, even though some of the plaintiffs are infants (*Mandeno* v. *Mandeno*, l. c.; *Swan* v. *Webb*, 1 W. R. 90).

(*w*) For the form of order under this section, see Seton, 231, 251, 1182.

Application under section, how made.

An order was made under this section for the sale of real estate pending a reference to the Master (*Martin* v. *Hadlow*, 1 W. R. 101). As to sales by the Court generally, see Daniell, 1164; Ord. XXXV. 13, *post;* 13th, 14th, and 15th Regul. as to business, August, 1857, Appendix, p. lv., *post*.

Before sale of estate abstract of title to be laid before some conveyancing counsel.

LVI. Before any estate or interest shall be put up for sale under a decree or order of the Court of Chancery, an abstract of the title thereto shall, with the approbation of the Court, be laid before some conveyancing counsel to be approved by the Court (*x*) for the opinion of such counsel thereon, to the intent that the said Court may be the better enabled to give such directions as may be necessary respecting the conditions of sale of such estate or interest, and other matters connected with the sale thereof; and when an estate or interest shall be so put up for sale, a time for the delivery of the abstract of title thereto to the purchaser or his solicitor shall be specified in the said conditions of sale.

Time for delivery of abstract.

Conveyancing counsel.

(*x*) As to the practice of obtaining the opinion of the conveyancing counsel, and the cases when it will be dispensed with, see 15 & 16 Vict. c. 80, ss. 40, 41, and notes thereto, *ante*, p. 158; and as to the fees payable to the conveyancing counsel, see Ord. XL. 30, and notes.

Where real or personal property is the subject of proceedings, Court may allow part or whole of the annual income.

LVII. Where any real or personal property shall form the subject of any proceedings in the Court of Chancery, and the Court shall be satisfied that the same will be more than sufficient to answer all the claims thereon which ought to be provided for in such suit (*y*), it shall be lawful for the said Court (*z*), at any time after the com-

mencement of such proceedings, to allow to the parties interested therein, or any one or more of them, the whole or part of the annual income of such real property, or a part of such personal property, or a part or the whole of the income thereof, up to such time as the said Court shall direct, and for that purpose to make such orders as may appear to the said Court necessary or expedient (*a*). 15 & 16 Vict. c. 86, s. 57.

(*y*) The allowance will not be made unless the executors admit assets (*Knight* v. *Knight*, 16 Beav. 358); nor unless the parties are clearly entitled, and there is some pressing reason for making it (*Rowley* v. *Burgess*, 2 W. R. 652; *Chubb* v. *Carter*, 2 W. N. (1867), 179; and see before the Act came into operation, *Moffat* v. *Burnie*, 16 Beav. 298). Where allowance will be made.

(*z*) See *Stacey* v. *Southey*, 1 Drew. 400, where an allowance of the income of a married woman's separate estate was ordered to be made to her, pending a suit to charge her with the value of timber cut, security having been given for the value of the timber.

(*a*) Applications under this section should be made in chambers, and ought not to be made the subject of an application in open court (*Bentley* v. *Craven*, 1 W. R. 362). Application made in chambers.

LVIII. The practice of the Court of Chancery with respect to injunctions for the stay of proceedings at law (*b*) shall, so far as the nature of the case will admit, be assimilated to the practice of such court with respect to special injunctions generally, and such injunctions may be granted upon interlocutory applications supported by affidavit (*c*), in like manner as other special injunctions are granted by the said Court (*d*). As to injunctions for stay of proceedings.

(*b*) Under the old practice the plaintiff in equity was entitled to the injunction to stay proceedings at law, called the *common injunction*, if the defendant made default in appearance, or did not demur, plead, or answer *within eight days after his appearance* to the bill for the injunction, see *Anderson* v. *Noble*, 1 Drew. 143; and observations in *Lovell* v. *Galloway*, 17 Beav. 3; but if the defendant filed an answer, the plaintiff could not read affidavits to contradict such answer upon the motion. Old practice as to *common injunctions*.

The change therefore effected by this clause was not intended, as has sometimes been thought, *only* for the benefit of the defendant, but also for that of the plaintiff, as it enables him to get what used to be called the common injunction immediately on the filing of the bill, in the same way in which he could get a special injunction (per L. J. Knight Bruce in *Harris* v. *Collett*, 26 Beav. 225, note). Thus, where a defendant has not within a reasonable time put in his answer to a bill charging fraud against him, he cannot resist an injunction to restrain him from proceeding in his action at law (*Peninsular Bank* v. *Darthez*, 14 W. R. 454; see *Lloyd* v. *Adams*, 4 K. & J. 467). And where the plaintiff in equity makes a *primâ facie* case, although that case is met by the defendant's affidavit denying the plaintiff's equity, still the plaintiff will have a right to an injunction to restrain proceedings at law, until answer, in order to secure a full discovery in aid of his defence at law (*Senior* v. *Pritchard*, 16 Beav. 473, marginal note). Comp. *Fitzgerald* v. *Butt*, 9 Hare, App. lxv.; and *Lovell* v. *Galloway*, 17 Beav. 6, where it was said that "in a *bonâ fide* case, verified by affidavit, showing the Court that information New practice. (1) The plaintiff (*a*) need not wait eight days for the injunction, but may on a primâ facie case being made obtain an injunction until answer.

15 & 16 Vict. c. 86, s. 58.

may be given by the answer of the defendant which may assist the plaintiff in wholly or partially destroying the case made against him at law, the plaintiff in equity is entitled to that discovery, and therefore that in such cases the injunction will be granted *until answer*," see also *Garle* v. *Robinson*, 3 Jur. N. S. 633.

(β) Does not lose the injunction on insufficient answer being put in.

And where the defendant puts in an answer, the injunction is no longer thereby at once dissolved, without regard to the sufficiency of the answer; see next section and note thereto.

Plaintiff cannot move before filing interrogatories.

But where a plaintiff filed a bill for discovery in aid of his defence to an action at law (as to which, see Seton, 1414), and moved for an injunction to restrain the action, *before interrogatories were filed*, the motion was refused (*Lovell* v. *Galloway*, 1 W. R. 118; but see *Harris* v. *Collett*, l.c.; *Fitzgerald* v. *Butt*, 9 Hare, App. lxv., where, however, the defendants had not appeared, so that no interrogatories could be filed); and *à fortiori*, this course will be followed when the defendant files an affidavit, displacing the grounds of defence at law (*Chilton* v. *Campbell*, 20 Beav. 531). See, also, *Fuller* v. *Ingram*, 7 W. R. 302, V.-C. W., where it was held that though the Court would, at the suit of the heir at law contesting a will of real estate, restrain the devisee from proving the will in the Court of Probate, until he had put in an answer to a bill of discovery filed by the heir, yet the injunction would not be granted until interrogatories had been filed. When the common injunction has been obtained, and the plaintiff at law afterwards answers, it is the proper practice for him to give notice of motion to dissolve the injunction (*Langford* v. *May*, 16 Beav. 32; and see *Oodeen* v. *Oakley*, 2 D. F. J. 158).

(2) The defendant's case will be tried on the merits.

On the other hand, whereas before this Act the defendant could not resist or move to dissolve the injunction until he had put in a full answer, which often worked injustice, the Court will now act, upon the motion for a common injunction, as it did formerly on showing cause against dissolving, that is to say, it will consider whether there is a fair question to be reserved for hearing, and whether there ought to be an injunction in the meantime (*Magnay* v. *The Mines Royal Company*, 3 Drew. 130. See, too, *Fox* v. *Hill*, 2 De G. & J. 353; and *Harris* v. *Collett*, 26 Beav. 222, the judgment in which places the intentions of the Legislature in framing the clause in a very clear light).

Costs of such motion.

It was held by Lord Romilly, M.R., after consulting with the other judges, that the costs of a motion for an injunction on a bill for discovery (if unsuccessfully opposed) are payable by the defendant, although he gets the costs of the suit generally (*Lovell* v. *Galloway*, 19 Beav. 643; and see *Fitzgerald* v. *Butt*, l. c.). As to the practice on injunctions generally, see note to Ord. XXV. *post*.

Affidavit as to merits.

(c) The motion for the common injunction being now generally on notice, an affidavit as to merits is generally unnecessary (*Sergison* v. *Beavan*, 16 Jur. 1111). When it is made *ex parte*, however, it was held that the affidavit must be made (*Mollett* v. *Enequist* (No. 1), 25 Beav. 609; see Seton, 512).

Motion ex parte.

In a fit case the Court may still grant an injunction to stay action at law and trial, without notice, but this discretion will be exercised with the greatest caution, and, when the plaintiff did not apply till the eve of trial, and surprise was shown, the order obtained *ex parte* was discharged, with costs (*Larmuth* v. *Simmons*, Seton on Decrees, p. 877; *Fisher* v. *Baldwin*, 1 W. R. 484). In *John* v. *John*, 1 L. T. N. S. 385, the injunction had been obtained *ex parte*; and, on a motion to dissolve it, the Court ordered the plaintiff to proceed with his action, on his giving an undertaking to deal with the verdict as the Court should direct. It was said in *Holme* v. *Brown*, 9 Hare, App. xxix., that a plaintiff in equity could not, after unnecessarily delaying his proceedings, come to the Court on the eve of a trial at law, to extend the common injunction to stay trial, although the lapse of time before the application was made might be no objection to granting it if the trial were not near; and comp. *Zulueta* v. *Vinent*, 15 Beav. 575; *Fisher* v. *Baldwin*, 1 W. R. 484, where it was sought to stay execution.

Jurisdiction of courts of equity since 17 & 18 Vict. c. 125.

(d) Under the "Common Law Procedure Act, 1854," courts of common law have power to compel discovery (17 & 18 Vict. c. 125, ss. 50, 57); and to admit equitable defences (c. 83). The existence of this jurisdiction does not, however, interfere with the concurrent jurisdiction in equity to restrain

actions at law upon equitable grounds (*Magnay* v. *The Mines Royal Company*, 25 L. J. Ch. 413; *Croskey* v. *European and American Steam Shipping Company*, 1 J. & H. 108. Cf. *The British Empire Shipping Company* v. *Somes*, 3 K. & J. 433; *Hodgson* v. *Druce*, 4 W. R. 576; *Walker* v. *Micklethwaite*, 1 Drew. & Sm. 49; *Kingford* v. *Swinford*, 7 W. R. 215; *Gompertz* v. *Pooley*, 4 Drew. 448; *Evans* v. *Bremridge*, 2 K. & J. 174, 181; on appeal, 8 D. M. G. 100; *Terrell* v. *Higgs*, 1 De G. & J. 388, 390, and cases there cited). 15 & 16 Vict. c. 86, s. 58.

Where, however, a defendant at law had pleaded equitable pleas at law, and then filed a bill for an injunction, setting up the same case as in his defence at law, and alleging also complicated accounts, the injunction was refused (*Farebrother* v. *Welchman*, 3 Drew. 122; *Terrell* v. *Higgs*, l. c.; cf. *Prothero* v. *Phelps*, 25 L. J. Ch. 105, and Ord. XLII. 5, *post*); but it seems the mere fact of such a defence having been pleaded at law, though it may be material on the question of costs, does not prevent the defendant at law from filing his bill, at least if the true equitable question is not likely to be touched (*Evans* v. *Bremridge*, l. c.; and see further, as to equitable pleas, *Clarke* v. *Laurie*, 28 L. T. 125, Exch.; *Stewart* v. *Great Western Railway Company*, 2 D. J. S. 319; and see *Thornton* v. *McKewan*, 1 H. & M. 525; *Baxendale* v. *West Midland Railway Company*, 3 Giff. 650. Equitable pleas at law.

Thus, where the plaintiff in an action at law filed a bill in equity to restrain the defendant from setting up an inequitable defence, a demurrer on the ground that the plaintiff had selected his own court was overruled, *Stewart* v. *Great Western Railway Company*, 6 N. R. 325.

LIX. Upon application by motion or petition to the Court in any suit depending therein for an injunction or a receiver, or to dissolve an injunction, or discharge an order appointing a receiver, the answer of the defendant shall, for the purpose of evidence on such motion or petition, be regarded merely as an affidavit of the defendant, and affidavits may be received and read in opposition thereto (*e*). Answer to be regarded as an affidavit, on motion for injunction, &c.

(*e*) Formerly on a motion for the common injunction (see note (*b*) to last sect.) the defendant's answer could not be contradicted. Cross-examination on answer.

A defendant who had not submitted to be cross-examined upon his answer was not allowed to read it in opposition to a motion for an injunction (*Wightman* v. *Wheelton*, 23 Beav. 397). But it seems that the plaintiff cannot cross-examine the defendant on such answer unless the latter intends to use it (*ibid.*; see marginal note to 23 Beav. 397; and comp. *Abadom* v. *Abadom*, 24 Beav. 423, and *Rehden* v. *Wesley*, 26 Beav. 432. And see *ante*, note (*u*), p. 193—4).

LX. In case any of the directions herein contained, with respect to the practice and course of proceeding in the said Court of Chancery, shall by mistake of parties fail to be followed in any suit or proceeding in the said court, it shall be lawful for the said Court, if it shall think fit, upon payment of such costs as such Court shall direct, to make such order giving effect to and rectifying such proceedings as may be justified by the merits of the case. Where directions not followed, Court may make order and award costs.

15 & 16 Vict. c. 86, s. 61.

Court not to direct cases to be stated for opinions of law courts.

LXI. (*f*) It shall not be lawful for the said Court of Chancery, in any cause or matter, to direct a case to be stated for the opinion of any Court of Common Law, but the said Court of Chancery shall have full power to determine any questions of law, which in the judgment of the said Court of Chancery shall be necessary to be decided previously to the decision of the equitable question at issue between the parties (*g*).

Questions of law.

(*f*) This section is not retrospective (*Hobson* v. *Neale*, 22 L. J. Exch. 175; See generally as to the decision of questions of law or fact arising in a Court of Equity, note (*d*) to sect. 3 of Lord Cairns' Act, p. 264, *post*.

(*g*) See *Dufaur* v. *Sigel*, 4 D. M. G. 520.

Court may determine legal title.

LXII. In cases where, according to the present practice of the Court of Chancery, such Court declines to grant equitable relief until the legal title or right of the party or parties seeking such relief shall have been established in a proceeding at law, the said Court may itself determine such title or right without requiring the parties to proceed at law to establish the same (*h*).

(*h*) See the preceding note.

Lord Chancellor and judges to make general rules and orders for carrying purposes of this Act into effect.

LXIII. The Lord Chancellor, with the advice and assistance (*i*) of the Master of the Rolls, the Lords Justices of the Court of Appeal in Chancery, and the Vice-Chancellors, or any three of them (*k*), may and they are hereby required from time to time to make general rules and orders for carrying the purposes of this Act into effect, and for regulating the times and form and mode of procedure, and generally the practice of the said Court, in respect of the matters to which this Act relates, and for regulating the fees and allowances to all officers of the said court and solicitors thereof in respect to such matters, and, so far as may be found expedient, for altering the course of proceeding hereinbefore prescribed in respect to the matters to which this Act relates, or any of them; and such rules and orders may from time to time be rescinded or altered by the like authority; and all such rules and orders shall take effect as general orders of the said Court.

(*i*) This section takes away the power of the Lord Chancellor to make orders alone in respect of the matters to which this act relates (*Short* v. *Roberts*, 2 L. R. Ch. 13). 15 & 16 Vict. c. 86, s. 63.

(*k*) That is *with the advice of* any three of them (*Short* v. *Roberts* (l. c.)), see notes to Order 2 Aug. 1864, and Oct. 6, 1866, *post*. Power of Lord Chancellor.

LXIV. All general rules and orders of the Lord Chancellor, with such advice and assistance as aforesaid, shall immediately after the making and issuing thereof be laid before both Houses of Parliament, if Parliament be then sitting, or if Parliament be not then sitting, within five days after the next meeting thereof: Provided always, that if either of the Houses of Parliament shall, by any resolution passed within thirty-six days after such rules or orders have been laid before such Houses of Parliament, resolve that the whole or any part of such rules or orders ought not to continue in force, in such case the whole or such part thereof as shall be so included in such resolution, shall, from and after such resolution, cease to be binding. Such general rules and orders to be laid before Parliament.

[Sect. 65 relates to the salaries of the examiners.]

LXVI. In the construction of this Act the words "bill of complaint" shall mean also and include information; the word "affidavit" shall mean also and include affirmation: the expression "Lord Chancellor" shall mean and include the Lord Chancellor, Lord Keeper, and Lords Commissioners of the Great Seal of the United Kingdom for the time being: and the expression "General Order of the Lord Chancellor" shall mean General Order of the Lord Chancellor with such advice and assistance as aforesaid. Construction of terms.

LXVII. This Act shall commence and take effect from and after the first day of November, one thousand eight hundred and fifty-two; provided that it shall be lawful for the Lord Chancellor, with such advice and assistance as aforesaid, to make and issue any such general rules or orders as aforesaid at any time after the passing of this Act, so as the same be not made to take effect before the time appointed for the commencement of this Act. Commencement of Act.

15 & 16 Vict. c. 86.

SCHEDULE.

Form of Indorsement on Bill of Complaint.

To the within-named defendant *C.D.*, greeting.

Victoria R.

We command you ["and every of you," *where there is more than one defendant*], that within eight days after service hereof on you, exclusive of the day of such service, you cause an appearance to be entered for you in Our High Court of Chancery to the within bill of complaint of the within-named *A.B.*, and that you observe what our said Court shall direct. Witness Ourself at Westminster, the day of in the year of our reign.

Note.—If you fail to comply with the above directions the plaintiff may enter an appearance for you, and you will be liable to be arrested and imprisoned, and to have a decree made against you in your absence (*l*).

Appearances are to be entered at the Record and Writ Clerks' Office, Chancery Lane, London.

(*l*) See Ord. IX. 2, *post*.

SUITORS IN CHANCERY RELIEF ACT.

15 & 16 VICT. Cap. 87.

An Act for the Relief of the Suitors of the High Court of Chancery. [1*st July*, 1852.

[Ss. 1—4 relate to certain fees and emoluments abolished.]

15 & 16 Vict. c. 87.

Allowances for copying to cease, and power to Lord Chancellor to make regulations as to copies.

V. From and after the twenty-eighth day of October, one thousand eight hundred and fifty-two, the several allowances for copying provided for and directed to be paid to the clerk of reports, the clerks of entries, the assistant clerk of affidavits, the clerks of the examiners, and the copying or writing clerks of the Masters in Ordinary of the said court, by any Act or Acts of Parliament now in

force, shall cease; and it shall be lawful for the Lord Chancellor, by any order or orders to be from time to time made by him, to make such regulations as to the making and delivering copies of the pleadings and other proceedings in the said court, and of the documents relating thereto, and the manner in which such copies should be paid for, and the amount of charge for the same, and by whom the amount to be so charged should be received, as may from time to time seem expedient (*a*). 15 & 16 Vict. c. 87, s. 5.

(*a*) See as to copies, Ord. XXXVI., *post*, and Regul. as to fees, Appendix, pp. xlix., l., *post*.

VI. It shall be lawful for the Lord Chancellor, by any order or orders to be from time to time made by him, to vary, reduce, or abolish all or any of the fees payable in relation to proceedings in the Court of Chancery, and to substitute one or more fee or fees in lieu thereof, and to direct that all or any of such fees shall, from a day to be named in such order or orders, and thenceforth, be collected by means of stamps to be provided and used in manner hereinafter mentioned (*b*). Lord Chancellor may vary &c. fees, and provide for their collection by stamps.

(*b*) See Ord. XXXVI. 1, and XXXIX. 3—8, and Regul. as to fees, Appendix, pp. xlvii.—lii., *post*.

VII. From and after the day named in such order or orders, unless and until the Lord Chancellor shall otherwise direct, none of the fees mentioned in such orders respectively shall be received in money, but by a stamp denoting the amount of the fee which otherwise would be payable; and where any fee shall be payable in respect of any document such stamp shall, at the expense of the party liable to pay the fee, and in such manner and under such regulations as shall by any order or orders be directed, be stamped or affixed on the vellum, parchment, or paper on which the proceeding in respect whereof such fee is payable is written, printed, or engrossed, or which may be otherwise used in reference to such proceeding. After such order, fees not to be received in money, but by means of stamps.

[Sections 8—13 contain provisions as to the sale of stamps, &c.]

XIV. It shall be lawful for the Lord Chancellor, *intrusted by virtue of the Queen's sign manual with the* Power to abolish fees in lunacy, and to

15 & 16 Vict. c. 87, s. 14.

substitute a per-centage in lieu thereof.

care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind (*c*), by any order or orders to be from time to time made by the Lord Chancellor, *intrusted as aforesaid* (*c*), to abolish all or any of the fees payable in relation to proceedings in lunacy, and to direct that such of the fees as shall not be abolished, if any, shall be collected by means of stamps in the manner hereinbefore provided with respect to fees payable in relation to proceedings in the Court of Chancery, and also to direct that in lieu of all or any of such fees a percentage or *ad valorem* payment shall be paid on the clear annual incomes of the persons found idiot, lunatic, or of unsound mind, and on the amount of the taxed costs incurred in proceedings in lunacy, or on such annual incomes only, or on the amount of such taxed costs only, the amount of such annual incomes as aforesaid, and the amount of the percentage or *ad valorem* payment to be paid thereon or on such taxed costs to be from time to time ascertained and fixed in such manner, by such means, and under such regulations as the Lord Chancellor, intrusted as aforesaid, shall by any order or orders direct, and the amount of such percentage or *ad valorem* payment to be paid into the Bank of England in the name of the Accountant-General of the Court of Chancery, to be placed to the account there intituled, "The Suitors' Fee Fund Account," at such times and by such persons as the Lord Chancellor, intrusted as aforesaid, shall by any order or orders direct: Provided always, that the amount to be raised by such percentage or *ad valorem* payment shall not exceed the amount which may from time to time be required to provide for the payment of the salaries, expenses, and sums of money payable under the Act of the session holden in the fifth and sixth years of the reign of her present Majesty, chapter eighty-four, or any other Acts or Act of Parliament for the time being in force with respect to lunatics; and that a statement of the amount of such percentage or *ad valorem* payment shall from time to time, within fourteen days next after the same shall have been settled, be laid on the table of

the House of Commons, if Parliament shall be then assembled, or if Parliament shall not be then assembled, then within fourteen days after the meeting of Parliament then next following. 15 & 16 Vict. c. 87, s. 14.

(*c*) The Lords Justices are in fact also intrusted with this care, see Lewin, 754, note (*e*); 16 & 17 Vict. c. 70, s. 100; Seton 74.

XV. All the jurisdiction and all the powers and authorities of a judicial nature, given by the Act of the session holden in the first year of the reign of King William the Fourth, chapter sixty-five, by "The Trustee Act, 1850," and by any other Acts or Act of Parliament now in force, to the Lord Chancellor, intrusted by virtue of the Queen's sign manual with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind, shall belong to and may be exercised by all or any of the *persons or person for the time being intrusted as aforesaid* (*d*). Certain statutory jurisdiction of Lord Chancellor as to lunatics to be exercised by persons for the time being so intrusted.

(*d*) As to the jurisdiction of the Lords Justices in lunacy, see last note; and see sect. 11 of the Trustee Extension Act, p. 116, *ante*, and note (*o*), p. 70, and note (*q*), p. 81, *ante*. Jurisdiction in lunacy.

[Sections 16—40 relate to the payment of the salaries of the judges, the Accountant-General, the secretary of presentations, and the duties of the *clerks of records and writs;* as to which see now Ord. I. 35—53, and Ord. XXIII. 29, *post.*] Clerks of Records and Writs.

XLI. The deposit now payable (*e*) on setting down appeals and exceptions for hearing shall continue to be payable, and such deposits shall be paid to and received by the senior registrar of the Court of Chancery for the time being, who shall once in every three months pay all sums so received by him into the Bank of England to the credit of the Accountant-General of the said court (the amount so received and paid by such registrar to be verified by affidavit), and the several sums when so paid in shall be from time to time placed to an account to be intituled "The Appeal Deposit Account," and the monies which shall from time to time be standing to such account shall be paid and applied as the Court of Chancery shall from time to time in that behalf order or direct. Deposits on appeals to be paid into Bank, and placed to "The Appeal Deposit Account."

15 & 16 Vict. c. 87, s. 41.

(*e*) The deposit on appeals is 20*l.*, Ord. XXXI. 4 and note, and see Daniell, 1364. It is now payable on appeals from orders on *motions* for decree, Ord. XXXI. 8.

Sale by auction under decree.

[Ss. 42, 43, provide that persons may sell by auction under an order of the Court of Chancery, without being liable to the duty imposed on auctioneers' licences: ss. 44—54 relate to fees and emoluments reduced or abolished, and to the salaries of chief clerks.]

Interpretation of term "Lord Chancellor."

LV. In the construction of this Act, unless such meaning be repugnant to or inconsistent with the context, the expression "Lord Chancellor" shall mean and include the Lord High Chancellor of Great Britain, and the Lord Keeper or Lords Commissioners of the Great Seal of the United Kingdom for the time being.

OATHS IN CHANCERY ACT.

16 & 17 VICT. CAP. 78.

An Act relating to the Appointment of Persons to administer Oaths in Chancery, and to Affidavits made for Purposes connected with Registration.

[15*th August*, 1853.

16 & 17 Vict. c. 78.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

"Masters Extraordinary" to cease to be so styled, and to be designated "Commissioners."

I. The persons now styled "Masters Extraordinary in Chancery" shall cease to be so styled, and they and all persons hereinafter appointed by the Lord Chancellor to execute like duties in England shall be designated "Commissioners to administer oaths in Chancery in England" (*a*), and shall possess and exercise all such powers and discharge all such duties as now appertain to the office of Master Extraordinary in Chancery by virtue of any statute or order of the Court of Chancery or of the Lord Chancellor, or usage in that behalf, or otherwise.

(*a*) See Ord. IV. 1, which provides that these commissioners shall not do any act incident to their office within ten miles of Lincoln's Inn Hall.

Power to appoint solicitors

II. It shall be lawful for the Lord Chancellor from

time to time to appoint any persons practising as solicitors (*b*) within ten miles from Lincoln's Inn Hall at their respective places of business (*c*) to administer oaths and take declarations, affirmations, and attestations of honour in Chancery, and to possess all such other powers and discharge all such other duties as aforesaid; and such persons shall be styled "London Commissioners to administer oaths in Chancery;" and they shall be entitled to charge and take a fee of one shilling and sixpence (*d*) for every oath administered by them, and for every declaration, affirmation, or attestation of honour taken by them, subject to any order of the Lord Chancellor varying or annulling the same.

16 & 17 Vict. c. 78, s. 2.

to administer oaths and take declarations in Chancery, and to be styled "London Commissioners."

(*b*) The solicitor in the cause, or his clerk, is excluded, *Hopkin* v. *Hopkin*, 10 Hare, App. ii.; *Wood* v. *Harper*, 3 Beav. 290; but a plaintiff being a solicitor, but not the solicitor in the cause, was allowed to put in an affidavit sworn before his clerk, *Foster* v. *Harvey*, 11 W. R. 899.

Solicitor in the cause excluded.

(*c*) These words are not to be taken as defining the place where the oath is to be administered, but as denoting "the whole range within which the solicitors are to be considered as practising" (per Lord Cranworth, in *Re Record and Writ Clerks*, 3 D. M. G. 723. It follows that it is not necessary that the oath should be taken in the commissioner's office (*ibid.*).

Oath, where to be administered.

By 18 & 19 Vict. c. 134, s. 15, persons taking a false oath, &c., are to be liable to the penalties of perjury, at whatever place the oath is taken. The commissioner is to state in the jurat or attestation at what place the oath, &c., has been taken (*ibid.*)

False oath.

(*d*) This fee is still payable, see Regul. as to fees, Appendix p. xlvi., *post*.

Fee.

III. It shall be lawful for the Lord Chancellor from time to time to appoint any persons practising as solicitors in the Isle of Man, in the Channel Islands (*e*), or any of them, to administer oaths and take declarations, affirmations, and attestations of honour in Chancery, and to possess all such other powers and discharge all such other duties as aforesaid; and such persons shall be styled "Commissioners to administer oaths in Chancery for the Channel Islands," and they shall be entitled to charge and take the same fees as the said "Commissioners to administer oaths in Chancery."

Commissioners may be appointed to administer oaths in Chancery for the Channel Islands.

(*e*) Affidavits to support an application for a *habeas corpus* may be sworn before a commissioner to administer oaths in Chancery in Jersey, there being no commissioners in that island for taking affidavits for the common law courts (*Re Dodd*, 6 W. R. 174).

Jersey.

IV. The fiat or document by which any such commissioners as aforesaid shall be appointed shall bear a

Commissioners' appointment to bear a Chan-

16 & 17 Vict. c. 78, s. 4.

Chancery stamp of one pound, in lieu of the stamp of five shillings now required; but no other charge or fee shall be made or payable in respect of such appointment, or of anything requisite to be done in order to perfect the same; and it shall not be necessary that any such appointment should be published in the London Gazette.

cery stamp of 1*l.* in lieu of other charges.

Nothing to lessen power of Lord Chancellor.

V. Nothing herein contained shall abridge or lessen the power of the Lord Chancellor as it now exists to appoint fit persons to administer oaths and take declarations, affirmations, and attestations of honour in Chancery, or to regulate the fees to be taken by them (*f*), and where any Act of Parliament refers to the Masters Extraordinary in Chancery, or to their powers or duties, the reference shall be held to apply to, and include, the commissioners hereinbefore mentioned, or to their powers or duties, as the case may be.

Reference to Masters Extraordinary in Acts to apply to commissioners.

(*f*) See now Regul. as to fees, Appendix, p. xlvi.

[Sect. VI. extends the provisions of 15 & 16 Vict. c. 86, ss. 22—24, to the Isle of Man, see note (*g*), p. 180, *ante*.]

Persons authorised to administer oaths in Chancery may administer oaths in Chancery of County Palatine of Lancaster.

VII. That where any person is or shall be authorised to administer oaths for the High Court of Chancery, such person is and shall be authorised to administer oaths for all suits and matters whatsoever in the Chancery of the County Palatine of Lancaster; and where any plea, answer, affidavit, or other document whatsoever is or shall be receivable in evidence in the High Court of Chancery, the same shall be in like manner receivable in the said court of the county palatine.

Term "Lord Chancellor."

VIII. The term "Lord Chancellor" shall mean also and include the Lord Keeper and Lords Commissioners for the custody of the Great Seal for the time being.

INFANTS' SETTLEMENT ACT.

18 & 19 VICT. CAP. 43.

An Act to enable Infants, with the Approbation of the Court of Chancery, to make binding Settlements of their Real and Personal Estate on Marriage.

[*2nd July*, 1855.

18 & 19 Vict. c. 43.

WHEREAS great inconveniences and disadvantages arise in consequence of persons who marry during minority being incapable of making binding settlements of their property: For remedy whereof be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

Infants may, with the approbation of the Court of Chancery, make valid settlements or contracts for settlements of their real and personal estate upon marriage.

I. From and after the passing of this Act it shall be lawful for every infant upon or in contemplation of his or her marriage, with the sanction of the Court of Chancery (*a*), to make a valid and binding settlement (*b*) or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder, or expectancy; and every conveyance, appointment, and assignment of such real or personal estate, or contract to make a conveyance, appointment, or assignment thereof, executed by such infant, with the approbation of the said Court, for the purpose of giving effect to such settlement, shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years: Provided always, that this enactment shall not extend to powers of which it is expressly declared that they shall not be exercised by an infant.

Duty of Court under this Act.

(*a*) In *Re Dalton*, 3 Sm. & G. 331; 6 D. M. G. 201: the Lord Chancellor expressed himself as of opinion that the Act did not impose on the Court any other duty than that of looking to the propriety of the *settlement*; and consequently, that the propriety of the marriage itself was not a question for its consideration, though of course "what in each case might be a proper settle-

18 & 19 Vict. c. 43, s. 1.

ment must sometimes lead to an inquiry as to all the circumstances connected with the marriage."

Course of proceeding.

Evidence must be adduced to show the age, rank, and position in life, and the property or fortune of the proposed husband or wife (see 20th Regul. as to business, Aug. 1857, Appendix, p. lv).

Draft how settled.

The draft of the settlement, when previously drawn by one of the conveyancing counsel, was directed to be taken into chambers to be perused by the chief clerk, and approved by the judge (*Re Williams*, 8 W. R. 678), otherwise the petition is adjourned into chambers that a settlement may be prepared; and see as to the employment of the conveyancing counsel, notes on p. 158, *ante*.

Conveyancing Counsel.

Where the infant was a ward of Court in a suit, two petitions were presented, the first to obtain an order for a strict settlement, and the second to sanction the settlement when prepared, *Powell* v. *Oakley*, 6 N. R. 375. See *Re Yates*, 7 W. R. 711.

Reference to chambers.

Where a female infant's fortune was very considerable, the Court referred the whole matter to chambers, (*Re Olive*, 11 W. R. 819).

What clauses inserted in settlement.

The Master of the Rolls refused to allow a clause providing that, in the event of any person professing the Roman Catholic religion becoming entitled, he should forfeit his interest under the settlement (*Re Williams*, an infant, l. c., and see cases cited in p. 9, *ad. fin.*) But the insertion of the usual name and arms clause was permitted (*ibid.*)

Settlement made out of Court.

(*b*) The Court has no jurisdiction under this Act to approve a settlement of an infant's property originally made without its concurrence, (per V.-C. Stuart in *Re Fuller's Settlement*, Feb. 10, 1860). The Act extends to post-nuptial settlements, *Powell* v. *Oakley*, 34 Beav. 575, and see *Re Hoare*, 11 W. R. 181.

Post-nuptial settlement.

A petitioner under this Act becomes a ward of Court, see note (*a*), p. 7, *ante*.

Ward of Court.

In case infant dies under age, appointment, &c., to be void.

II. Provided always, that in case any appointment under a power of appointment, or any disentailing assurance, shall have been executed by any infant tenant in tail under the provisions of this Act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void.

The sanction of the Court of Chancery to be given upon petition.

III. The sanction of the Court of Chancery to any such settlement or contract for a settlement may be given, upon petition (*c*) presented by the infant or his or her guardian (*d*), in a summary way, without the institution of a suit; and if there be no guardian, the Court may require a guardian to be appointed or not, as it shall think fit; and the Court also may, if it shall think fit, require that any persons interested or appearing to be interested in the property should be served with notice of such petition.

Application by petition.

(*c*) A petition is necessary though a suit is pending, *Pearcth* v. *Marriott*, 1 W. N. (1866), 48, and see *Harvey* v. *Clark*, 25 Beav. 7, under the Leases and Sales of Settled Estates Act, s. 16, p. 243, *post*.

Guardian petitioning.

(*d*) In *Re Strong*, 26 L. J. Ch. 64, Lord Justice Knight Bruce thought that an affidavit of the respectability of the person who acted as guardian ought to be produced.

IV. Provided always, that nothing in this Act contained shall apply to any male infant under the age of twenty years, or to any female infant under the age of seventeen years (*e*). 18 & 19 Vict. c. 43, s. 4. Not to apply to males under 20, or to females under 17 years of age.

(*e*) Evidence must be produced to show the age of the infant (20th Regul. as to business, August, 1857, Appendix, p. lv., *post*).

DESPATCH OF BUSINESS ACT, 1855.

18 & 19 VICT. CAP. 134.

An Act to make further Provision for the more speedy and efficient Despatch of Business in the High Court of Chancery, and to vest in the Lord Chancellor the Ground and Buildings of the said Court situate in Southampton Buildings, Chancery Lane, with Powers of leasing and Sale thereof. [14*th August*, 1855.

[The only important section of this Act, which relates principally to the duties of the junior clerks, and to the buildings, offices, &c., of the Court, is the 16th.]

XVI. And whereas by divers Acts of Parliament the Court of Chancery is empowered to make orders in respect of the disposition of trust funds, and other matters under its jurisdiction, upon petition presented or motion made in a summary way, without bill, but such orders cannot be made in respect of the same matters upon application at chambers: Be it therefore enacted, that the business to be disposed of by the Master of the Rolls and the Vice-Chancellors respectively while sitting at Chambers shall comprise such of the matters in respect of which the Court of Chancery is so as aforesaid empowered to make orders in a summary way as the Lord Chancellor, with the advice and assistance of the Master of the Rolls and the Vice-Chancellors or any two of them, may by any general order direct (*a*). 18 & 19 Vict. c. 134. Business which Court is not empowered to dispose of in a summary way, may be disposed of at chambers.

(*a*) The order of 12 Nov., 1866, now Ord. XXXV., 1, *post*, was issued in pursuance of the authority given by this section; see the note thereto, and see note (*e*), p. 146, *ante*.

LEASES AND SALES OF SETTLED ESTATES ACT (*a*).

19 & 20 VICT. CAP. 120.

An Act to facilitate Leases and Sales of Settled Estates.
[*29th July*, 1856.

19 & 20 Vict. c. 120, s. 1.

WHEREAS it is expedient that the Court of Chancery should have power in certain cases to authorise leases and sales of settled estates where it shall deem that such leases or sales would be proper and consistent with a due regard for the interests of all parties entitled under the settlement; and it is also expedient that persons in possession of land for certain limited interests should have power to grant agricultural or occupation leases thereof, at rack-rent, for a reasonable period: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Ord. xli. 14. 1 Wm. 4, c. 65.

(*a*) See Ord. XLI., 14—25, *post*, for the practice under this Act. As to applications on behalf of infants for leasing powers, &c. under 1 Wm. 4, c. 65, see Seton, 697; Daniell, 1852; *Re Clark*, 1 L. R. Ch. 292.

Interpretation of certain terms.

I. The word "settlement," as used in this Act, shall signify any Act of Parliament, deed, agreement, copy of court roll, will, or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure or any estates or interests in any such hereditaments stand limited to or in trust for any persons, by way of succession (*b*), including any such instruments affecting the estates of any one or more of such persons exclusively; and the term "settled estates," as used in this Act, shall signify all hereditaments of any tenure and all estates or interests in any such hereditaments which are the subject of a settlement, and for the purposes of this Act a tenant in tail after possibility of issue extinct shall be deemed to be a tenant for life.

(*b*) In determining what is a *settled estate* within this Act, it must be borne in mind that:— 19 & 20 Vict. c. 120, s. 1.

(1) The Act extends to settlements made before the passing of the Act; see sec. 44, p. 254, *post*.

What is a settled estate.

(2) The words "settlement" and "settled estates" in this Act include *estates* in remainder, &c., not disposed of by the settlement and *reverting* to a settlor or a testator's heir. See sect. 1 of the Amendment Act, 1858, p. 255, *post*.

Act extends to: (1) Estates settled before Act.

(3) Lords of settled manors are authorised to give licences to their *copyhold* or customary tenants to grant leases of lands held by them to the same extent and for the same purposes as leases may be authorised or granted of freehold hereditaments under this or the new Act. See sect. 2 of the Amendment Act, p. 255, *post*.

(2) Estate reverting. (3) Copyholds.

(4) "In determining what are settled estates within the Act, the Court shall be governed by the state of facts, and by the trusts or limitations of the settlement at the time of the said settlement taking effect," Amendment Act, 1864, sect. 3, p. 254, *post*. See before the Amendment Act, *Re Birtle's Settled Estates*, 11 W. R. 730.

(4) Estates *settled* when the instrument took effect.

(5) Where parties absolutely entitled to some shares in an estate, the other shares being in settlement, joined in an application for a sale, the Court decreed the whole estate to be sold, *Re Goodwin's Settled Estates*, 3 Giff. 620.

(5) Where *part* is settled.

(6) Where lands were devised to trustees in trust to sell at their discretion, and hold the proceeds in trust for a tenant for life, remainder to children, the lands were held to be settled within the meaning of the Act, and a lease for twenty-one years was directed, *Re Laing's Settled Estates*, 1 L. R. Eq. 416. See *Re Greene*, 10 Jur. N. S. 1098.

(6) Lands though converted in equity.

The L. J. J. have held that a limitation to trustees for children at twenty-one, and if but one child then for such child only, with trusts for maintenance, and a gift over, is not a limitation by way of succession within the Act, *Re Eardin's Will*, 7 W. R. 711, but in a similar case an order for a lease was made under 1 Wm. IV. c. 65, s. 17, *Re Clark*, 1 L. R. Ch. 292.

Trusts for *accruer* do not make settlement.

II. It shall be lawful for the Court of Chancery in England, so far as relates to estates in England, and for the Court of Chancery in Ireland, so far as relates to estates in Ireland, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, to authorise leases (*c*) of any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste or not, provided the following conditions be observed:

Power to Court of Chancery to authorise leases of settled estates, subject to certain conditions.

First, every such lease shall be made to take effect in possession at or within one year next after the making thereof, and shall be for a term of years not exceeding for an agricultural or occupation lease twenty-one years, for a mining lease, or a lease of water, water mills, wayleaves, waterleaves, or other rights or easements, forty years, and for a building lease (*d*)

19 & 20 Vict. c. 120, s. 2.

ninety-nine years, or where the Court shall be satisfied that it is the usual custom of the district (*e*) and beneficial to the inheritance to grant building leases for longer terms, then for such term as the Court shall direct (*f*):

Secondly, on every such lease shall be reserved the best rent (*g*) or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, to be made payable half-yearly or oftener, without taking any fine or other benefit in the nature of a fine:

Thirdly, where the lease (*h*) is of any earth, coal, stone, or mineral, a certain portion of the whole rent or payment reserved shall be from time to time set aside and invested as hereinafter mentioned; namely, when and so long as the person for the time being entitled to the receipt of such rent is a person who by reason of his estate, or by virtue of any declaration in the settlement, is entitled to work such earth, coal, stone, or mineral for his own benefit, one fourth part of such rent, and otherwise three fourth parts thereof; and in every such lease sufficient provision shall be made to ensure such application of the aforesaid portion of the rent, by the appointment of trustees or otherwise, as the Court shall deem expedient (*i*).

Fourthly, no such lease shall authorise the felling of any trees, except so far as shall be necessary for the purpose of clearing the ground for any buildings, excavations, or other works authorised by the lease:

Fifthly, every such lease shall be by deed, and the lessee shall execute a counterpart thereof; and every such lease shall contain a condition for re-entry on non-payment of the rent for a period not less than twenty-eight days after it becomes due.

Who may petition.

(*e*) As to who may petition, see sect. 16, p. 244, *infra*.

Leases how settled.

For form of order, see Seton, 532. As to settling leases in chambers, see note to sect. 10, *infra*.

Where some of the leases proposed to be granted were to be at a peppercorn

rent, it was held that a private Act should be applied for, *Cust* v. *Middleton*, 3 D. F. J. 33, and for a declaratory decree that it is fit and proper that an application should be made to parliament to extend the leasing powers affecting an estate, see *Savile* v. *Bruce*, 29 Beav. 557. 19 & 20 Vict. c. 120, s. 2.

(*d*) Building leases are to include *repairing leases*, but no repairing lease is to be made for a term exceeding sixty years, see sect. 2 of the Amendment Act, 1858, p. 255, *post*. When *private Act* is necessary. Repairing leases.

(*e*) See *Duke of Bedford* v. *Marquis of Abercorn*, 1 M. & C. 312.

(*f*) *In Re Cross's Charity*, 27 Beav. 592, the trustees of a dissenting chapel at St. Helen's, in the county of Lancaster, presented a petition praying that power to grant building leases of property in that place for any term not exceeding 600 years might be vested in them. The Master of the Rolls, on proof that it was customary to grant building leases for 999 years of land in the neighbourhood of St. Helen's, authorised the endorsement of a power to grant such a lease for 600 years on a deed declaring the trusts of a dissenting chapel. But it seems from *Re Carr's Settled Estates*, 9 W. R. 776, that before the Court will authorise the granting of building leases for 999 years, it will require evidence not only that such granting was according to the custom of the country, but also that the land could not be beneficially let on other terms. Long building leases. 600 years. 999 years.

The power given to the Court by this section of granting leases for larger terms than those thereby prescribed, is to all leases except agricultural leases, see sect. 4 of the Amendment Act, 1858, p. 256, *post*.

(*g*) The Act cannot be resorted to for the purpose of carrying out leases based on contracts by a testator, unless such contracts fall within the express terms of the Act; and where the contracts were for leases of parts of the testator's estate for building purposes, and provided for the granting of separate leases of the houses when built, apportioning the whole ground rent among some of them, and leaving the rest to be demised at a peppercorn rent, this was not held the best rent, *Cust* v. *Middleton* (l. c.). Though the new lease is to be at the "best rent, &c." yet the value of surrendered leases may be taken into consideration in regulating the terms of the new lease, *Re Rawlins*, 1 L. R. Eq. 286, see sect. 5, *infra*. "Best rent."

(*h*) In a proper case a lease of mines will be allowed to include a lease of so much land as may appear necessary for the convenient and effective working of the minerals, *Re Reveley*, 11 W. R. 774. Mining leases.

(*i*) See sect. 23, *post*, and notes to sect. 69 of the Lands Clauses Act, *ante*, p. 36.

III. Subject and in addition to the conditions hereinbefore mentioned, every such lease shall contain such covenants, conditions, and stipulations as the Court shall deem expedient with reference to the special circumstances of the demise (*k*). Leases may contain special covenants.

(*k*) As to "usual covenants" in a lease, see Davidson V. 47—9. Usual covenants.

IV. The power to authorise leases conferred by this Act shall extend to authorise leases either of the whole or any parts of the settled estates, and may be exercised from time to time. Parts of settled estates may be leased.

V. Any leases *granted under this Act* (*l*) may be surrendered, either for the purpose of obtaining a renewal of Leases may be surrendered and renewed.

19 & 20 Vict. c. 120, s. 5.

the same or not; and the power to authorise leases conferred by this Act shall extend to authorise new leases of the whole or any part of the hereditaments comprised in any surrendered lease.

21 & 22 Vict. c. 77, s. 5.

(*l*) The power conferred by this section is by s. 5 of the Amendment Act, 1858, *post*, p. 256, extended to all leases, whether granted under this Act or otherwise.

Power to authorise leases to extend to preliminary contracts.

VI. The power to authorise leases conferred by this Act shall extend to authorise preliminary contracts to grant any such leases; and any of the terms of such contracts may be varied in the leases.

Mode in which leases may be authorised.

VII. The power to authorise leases conferred by this Act may be exercised by the Court, either by approving of particular leases, or by ordering that powers of leasing, in conformity with the provisions of this Act, shall be vested in trustees in manner hereinafter mentioned (*m*).

(*m*) See note to sect. 10, *infra*.

What evidence to be produced on an application to authorise leases.

VIII. When application is made to the Court, either to approve of a particular lease, or to vest any powers of leasing in trustees, the Court shall require the applicant to produce such evidence as it shall deem sufficient to enable it to ascertain the nature, value, and circumstances of the estate, and the terms and conditions on which leases thereof ought to be authorised.

After approval of a lease, Court to direct who shall be the lessor.

IX. When a particular lease or contract for a lease has been approved by the Court, the Court shall direct what person or persons shall execute the same as lessor; and the lease or contract executed by such person or persons shall take effect in all respects as if he or they was or were at the time of the execution thereof absolutely entitled to the whole estate or interest which is bound by the settlement, and had immediately afterwards settled the same according to the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use, or otherwise as the Court shall direct.

X. Where the Court shall deem it expedient that any

general powers of leasing any settled estates conformably to this Act should be vested in trustees, it may by order vest any such power accordingly, either in the existing trustees of the settlement or in any other persons; and such powers, when exercised by such trustees, shall take effect in all respects as if the power so vested in them had been originally contained in the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use, or otherwise, as the Court shall direct; and in every such case the Court, if it shall think fit, may impose any conditions as to consents or otherwise on the exercise of such power, and the Court may also authorise the insertion of provisions for the appointment of new trustees from time to time for the purpose of exercising such powers of leasing as aforesaid (*n*).

19 & 20 Vict. c. 120, s. 10.

Powers of leasing may be vested in trustees.

(*n*) As to the persons claiming under the settlement taking the benefit of the covenants in a lease granted under these sections, see Davidson, III. 432.

Benefit of covenants.

It is now provided that in orders to be made under this section, no condition shall be inserted that the lease is to be settled by the Court (except where the parties desire it, or the Court thinks it necessary), and that such conditions, if already inserted, may be struck out by the Court. See ss. 1, 2, of the Amendment Act, 1864, p. 258, *post*.

Leases how to be settled.

Before this enactment it was considered that in all cases where trustees were empowered to grant leases, each separate lease, or one model lease, must be settled in chambers, *Re Procter's Settled Estates*, 5 W. R. 643; *Re Earl of Jersey's Settled Estates*, 9 W. R. 609; but now except in special cases, no form of lease need be settled in chambers, see *Re Dorning's Settled Estates*, 14 W. R. 125; *Re Hoyle's Settled Estates*, 12 W. R. 1125.

Not necessarily in chambers.

As to the employment of the conveyancing counsel of the court in cases where the lease is directed to be settled in chambers, see 15 & 16 Vict. c. 80, s. 40, p. 158. In such cases a model lease will, where expense may thus be saved, be directed to be settled and adopted for each lease, without the necessity of applying to chambers in every case (*Re Hemingway*, 7 W. R. 279, where the following order was made: "It is ordered that general powers of leasing the estates in the petition mentioned, subject to the provisions and restrictions in the Act contained, be vested in and in the petition mentioned, such powers to be exercised with the consent in writing of and such leases to be in such terms and conditions, and to contain such covenants, conditions, and stipulations, as shall be approved of by the judge to whose court this cause is attached"). It has been suggested that under this order the proceeding would be as follows: the parties would, by an affidavit of the surveyors employed, state the terms and conditions upon which it was proposed to grant the leases, and the intended covenants, conditions, and stipulations would also be stated, and a certificate approving of these particulars would answer every purpose; thus, the minimum rent per foot, the class of houses, the period to be allowed for building, the nature of the covenants for repairing, insuring, &c., would all be settled. This being done with care would render any further application unnecessary, unless a very different class of lease was required: See, too, as to model leases, *Re Chambers' Settled Estates*, 28 Beav. 653; 8 W. R. 646; *Re Earl of Jersey's Settled Estates*, 9 W. R. 609; *Attorney-General* v. *Christ Church, Oxford*, 3 Giff. 514.

15 & 16 Vict. c. 80, s. 40.

Model Leases.

19 & 20 Vict. c. 120, s. 11.

Court may authorise sales of settled estates, and of timber.

XI. It shall be lawful for the Court of Chancery in England, so far as relates to estates in England, and for the Court of Chancery in Ireland, so far as relates to estates in Ireland, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, from time to time to authorise a sale (*o*) of the whole or any parts of any settled estates (*p*) or of any timber (not being ornamental timber) (*q*) growing on any settled estates; and every such sale shall be conducted and confirmed in the same manner as by the rules and practice of the court for the time being is or shall be required in the sale of lands sold under a decree of the Court.

Who may petition.

Sales how sanctioned.

Form of prospective order.

(*o*) As to who may petition, see sect. 16, *infra*.

The Court will not sanction sales indefinitely, but only those mentioned in the petition, and any others which the Court shall be satisfied with as being beneficial. *Re Peacock's Settled Estates*, 15 W. R. 100.

For form of order, see Seton, 534; *Re Roper*, 2 N. R. 442; *Re Hilton*, 14 L. T. N. S. 129. Where the Court referred the matter to chambers, and directed that if it should appear by the certificate that it was fit and proper, &c., that the petitioner should be purchaser of the property, a conveyance should be made to that effect; and see note (*g*), *ante*, p. 37, as to "prospective orders."

Sale of mines apart from surface.

(*p*) It is clear that the Act authorises a sale of mines apart from the surface (*per* V.-C. S. *in Re Mallin*, 3 Giffard, 126; *Re Law*, 7 Jur. N. S. 511). Under an ordinary power of sale this could not be effected, *Buckley* v. *Powell*, *ibid.* 536; but see now the Confirmation of Sales Act, p. 259, *post*.

"Ornamental timber."

(*q*) As to the meaning of "ornamental timber," see *Marquis of Downshire* v. *Lady Sandys*, 6 Ves. 107; *Lord Mahon* v. *Lord Stanhope*, 3 Mad. 523, n.; *Micklethwaite* v. *Micklethwaite*, 1 De G. & J. 504; *Hallewell* v. *Phillips*, 6 W. R. 408.

Consideration for land sold for building may be a fee-farm rent.

XII. When any land is sold for building purposes it shall be lawful for the Court, if it shall see fit, to allow the whole or any part of the consideration to be a rent issuing out of such land, which may be secured and settled in such manner as the Court shall approve.

Minerals, &c., may be excepted from sales.

XIII. On any sale of land, any earth, coal, stone, or mineral may be excepted (*r*), and any rights or privileges may be reserved, and the purchaser may be required to enter into any covenant, or submit to any restrictions, which the Court may deem advisable.

(*r*) As to reservations of minerals, see 2 Davidson, 386, note (*a*).

19 & 20 Vict. c. 120, s. 14.

Court may authorise dedication of parts of settled estates for roads, &c.

XIV. It shall be lawful for the Court of Chancery in England, so far as relates to estates in England, and for the Court of Chancery in Ireland, so far as relates to estates in Ireland, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, from time to time to direct that any part of any settled estates be laid out (*s*) for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, either to be dedicated to the public or not; and the Court may direct that the parts so laid out shall remain vested in the trustees of the settlement, or be conveyed to and vested in any other trustees upon such trusts for securing the continued appropriation thereof to the purposes aforesaid in all respects, and with such provisions for the appointment of new trustees when required, as by the Court shall be deemed advisable (*t*).

Plans of roads, &c.

(*s*) The Court will not always require plans to be laid before it, *Re Hargreave's Settled Estates*, 15 W. R. 54.

Roads not allowed to be made with a view to *prospective* leases.

(*t*) The Court will not, under this section, sanction the sale of part of the estate, in order that the proceeds may be expended in making roads with a view to facilitate the granting of building leases thereof (*Re Chambers's Settled Estates*, 28 Beav. 653; *Re Hurle's Settled Estates*, 2 H. & M. 196; but see, *Re Gilbert*, cited *ibid.*, p. 199). Nor unless it is shown that the roads are required for the immediate benefit of the property in its existing state, or, at any rate, for the purpose of houses to be built on leases immediately contemplated, *Re Hurle's Settled Estates* (l. c.).

But a building lease may be granted to a lessee in consideration of his undertaking to make the roads (*Re Chambers*, 28 Beav. 655).

How sales and dedications are to be effected under the direction of the Court.

XV. On every sale or dedication to be effected as hereinbefore mentioned, the Court may direct what person or persons shall execute the deed of conveyance; and the deed executed by such person or persons shall take effect as if the settlement had contained a power enabling such person or persons to effect such sale or dedication, and so as to operate (if necessary) by way of revocation and appointment of the use, or otherwise, as the Court shall direct (*u*).

Legal estate bound by sale.

(*u*) Where an order was made for sale, under the Act, of lands the legal estate in which was outstanding in a mortgagee, and by a subsequent order it was directed that the mortgagee and other parties should be bound by the former order, it was held that a sale by the nominees of the Court bound the legal estate, which subsequently to the sale had been reconveyed by the mort-

19 & 20 Vict. c. 120, s. 15.

gagee to the trustees of the settlement (*Eyre* v. *Saunders*, 7 W. R. 366; and see 4 Jur. N. S. 830; and *Re Wilkinson's Trust*, cited note (*h*), p. 97, *ante*).

Application by petition to exercise powers conferred by this Act.

XVI. Any person entitled to the possession or to the receipt of the rents and profits of any settled estates (*v*) for a term of years determinable on his death, or for an *estate for life* (*w*) or any greater estate, may apply to the Court, by petition (*x*), in a summary way to exercise the powers conferred by this Act.

Incumbrancers.

(*v*) As to incumbrancers, see sect. 41, p. 254, *post*, and compare note (*l*), p. 38; and note (*u*), p. 45, *ante*.

"Estate for life."

(*w*) When a testator leaves property to his widow during her life or widowhood, she and the persons entitled in remainder may apply to the Court under this section (*Williams* v. *Williams*, 9 W. R. 888).

Form of petition, &c.

(*x*) As to the title, &c., of the petition, see Ord. XLI. 14, 15, *post*, and *Re Thompson's Settled Estates*, Johns. 413, there cited. For a form of petition, see Daniell iii., 1804.

Setting down.

The petition must not be set down for hearing until after the expiration of twenty-one days from the publication of the last of the advertisements, directed to be made by the 20th section of the Act, see Ord. XLI. 20, *post*.

It seems that a petition is necessary, even though a suit be pending (*Harvey* v. *Clark*, 25 Beav. 7). See note (*c*) to sect. 3 of Infants' Settlement Act, p. 234, *ante*.

With whose consent such application to be made.

XVII. Subject to the exception contained in the next section, every application to the Court must be made with the concurrence or consent of the following parties; namely (*y*),

Where there is a tenant in tail under the settlement in existence, and of full age, then the parties to concur or consent shall be such tenant in tail, or if there is more than one such tenant in tail then the first of such tenants in tail, and all persons in existence having any beneficial estate or interest under or by virtue of the settlement prior to the estate of such tenant in tail, and all trustees having any estate or interest on behalf of any unborn child prior to the estate of such tenant in tail;

And in every other case the parties to concur or consent shall be all the persons in existence having any beneficial estate or interest under or by virtue of the settlement (*z*), and also all trustees having any estate or interest on behalf of any unborn child.

(*y*) As to applications for re-investment not requiring this concurrence, see note (*m*) to sect. 24, p. 248, *infra*.

(*z*) Parties beneficially interested under the trusts of a term for raising *portions* must be served, *Re Boughton*, 12 W. R. 34; and see *Re Turbut*, cited in note (*x*), p. 253, *post*. 19 & 20 Vict. c. 120, s. 17.

Where trustees have power to give receipts for the monies payable (see 22 & 23 Vict. c. 35, s. 23, p. 278, *post*), their consent to the sale is sufficient (see note (*a*), p. 104, *ante*, and the cases there cited, and comp. *Ellison* v. *Cookson*, 2 Coll. 52; *Eyre* v. *Saunders*, 4 Jur. N. S. 830. So in a later case before the Master of the Rolls (*Grey* v. *Jenkins*, 26 Beav. 351), it was held that though trustees could only consent for unborn children, yet trustees *with a power of sale* might join in a sale which would be binding on all persons claiming under them, they being for this purpose treated just as if they were beneficial owners (see 26 Beav. 357); *Re Potts*, 15 W. R. 29. Trustees with powers of sale are treated as beneficial owners.

Upon every application under the Act for authority to sell, the Court must be satisfied by proper evidence as to the parties interested, whose consent is required by the Act (Ord. XLI. 22); and also as to the circumstances which render the proposed sale proper or expedient (*ibid.*). If such *consent* is withheld, the order cannot be made, however beneficial the proposed lease might prove to the estate, *Re Merry's Estate*, 15 W. R. 307; see *Re Hurle's Settled Estate*, cited note (*o*), p. 248, *infra*; *Re Hutchinson*, 14 W. R. 473. Evidence as to *consent* of parties interested.

XVIII. Provided nevertheless, that unless there shall be a person entitled to an estate of inheritance whose consent or concurrence shall have been refused or cannot be obtained, it shall be lawful for the Court, if it shall think fit, to give effect to any petition, subject to and so as not to affect the rights, estate, or interest of any person whose consent or concurrence has been refused or cannot be obtained, or whose rights, estate, or interest ought in the opinion of the Court to be excepted (*a*). Petition may be granted without consent, saving rights of non-consenting parties.

(*a*) Where there were a number of legatees having charges on a settled estate, and it was almost impossible to serve them all, the Court made an order without requiring them to be served, but inserted the following words in the order—"subject to and so as not to affect the rights, estate, and interest of any persons whose consent and concurrence could not be obtained," *Re Legge*, 6 W. R. 20; *Re Parry*, 34 Beav. 462; and the Court dispensed with the concurrence of a lunatic not so found by inquisition, who had a right to a definite annual sum out of the settled property, *Re Turbutt's Settled Estate*, 8 L. T. N. S. 603. See *Re Franklin*, 7 W. R. 45. The examination of a married woman, whose interest was remote and was represented by trustees, was dispensed with, *Re Lord de Tabley's Settled Estates*, 11 W. R. 936. Where difficult to obtain concurrence of all. Of lunatic. Feme covert having remote interest.

XIX. Notice of any application (*b*) to the Court under this Act (*c*) shall be served on all trustees who are seised or possessed of any estate in trust for any person whose consent or concurrence to or in the application is hereby required, and on any other parties who in the opinion of the Court ought to be so served, unless the Court shall think fit to dispense with such notice. Notice of application to be served on all trustees, &c.

(*b*) As to applications for re-investment not requiring this service, see note (*m*) to sect. 24, p. 248, *infra*.

19 & 20 Vict. c. 120, s. 19.

Directions as to notice, how given.

(*c*) As to this notice, see Ord. XLI. 14, 15. On the petition coming on for hearing, the Court will direct what persons (if any) are to be served with the notice, and after such service the petition will be brought on for hearing again (per V.-C. Kindersley, *Re Duke of Cleveland's Harte Estates, Ex parte Milbank*, May 7, 1858, where all persons interested were directed to be served with the petition, but see *Re Green's Trusts*, 8 W. R. 403).

Notice of application to be given in newspapers.

XX. Notice of any application (*d*) to the Court under this Act shall be inserted in such newspapers as the Court shall direct (*e*), and any person or body corporate, whether interested in the estate or not, may apply to the Court of Chancery by motion (*f*) for leave to be heard in opposition to or in support of any application which may be made to the Court under this Act; and the Court is hereby authorised to permit such person or corporation to appear and be heard in opposition to or support of any such application, on such terms as to costs or otherwise, and in such manner, as it shall think fit.

(*d*) See notes (*y*) and (*b*) on last page.

Advertising and setting down the petition.

(*e*) The application for directions as to the newspapers in which the notice is to be inserted is to be made in chambers. The judge's direction will be written on the petition, and signed by the chief clerk (Ord. XLI. 16); and see 23rd Regul. as to business, Aug. 1857, Appendix, p. lvii., *post*. The proper course is not to apply specially as soon as the advertisements have been inserted, that the petition may be in the paper on a particular day, but to get a certificate from the Lord Chancellor's secretary that they have been duly issued, when the petition will come into the paper as a matter of course, without further application (*Re Blake's Settled Estates*, 8 W. R. 539. See, as to the advertisements, note (*k*) to Ord. XLI. 16, and Ord. XLI. 20, *post*; and as to delivering copies of the petition if required by the party served and the payment for the same, see Ord. XLI., 18, 19.

(*f*) Such motion must be made within seven days, Ord. XLI. 17, *post*.

No application under this Act to be granted where a similar application has been rejected by Parliament.

XXI. The Court shall not be at liberty to grant any application under this Act in any case where the applicant, or any party entitled, has previously applied to either House of Parliament for a private Act to effect the same or a similar object, and such application has been rejected on its merits, or reported against by the judges to whom the bill may have been referred (*g*).

Application to Parliament.

(*g*) The Court must, upon every application under the Act, be satisfied that no such previous application has been made (Ord. XLI. 22), and the fact should be stated in the petition.

If the bill has been rejected the Court will presume, until the contrary has been shown, that it was rejected on the merits (*Re Wilson's Estates*, 1 L. T. N. S. 25).

Notice of the exercise of powers to be

XXII. The Court shall direct that some sufficient notice of any exercise of any of the powers conferred on

it by this Act shall be placed on the settlement or on any copies thereof (*h*), or otherwise recorded in any way it may think proper, in all cases where it shall appear to the Court to be practicable and expedient, for preventing fraud or mistake. 19 & 20 Vict. c. 120, s. 22. given by the Court.

(*h*) The documents on which the notice is to be indorsed are to be specified in the order, Ord. XLI. 24, *post*. See in the case of charity land, *Attorney-General* v. *Christchurch*, 3 Giff. 515.

XXIII. All money to be received on any sale effected under the authority of this Act, or to be set aside out of the rent or payments reserved on any lease of earth, coal, stone, or minerals as aforesaid, may, if the Court shall think fit, be paid to any trustees of whom it shall approve, or otherwise the same shall be paid into the Bank of England or Ireland, as the case may be, to the account of the Accountant-General of the Court of Chancery, *ex parte* the applicant in the matter of this Act, and in either case such money shall be applied as the Court shall from time to time direct to some one or more of the following purposes: (namely:) Court may appoint trustees to receive and apply monies arising from sales.

The purchase or redemption of the land tax, or the discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid; or, affecting any other hereditaments subject to the same uses or trusts; or,

The purchase of other hereditaments (*i*) to be settled in the same manner as the hereditaments in respect of which the money was paid (*k*); or,

The payment to any person becoming absolutely entitled (*l*).

(*i*) Where there was no existing trustee of settled estates which had been directed to be sold, the Court ordered new trustees to be appointed, and the lands purchased with the proceeds to be conveyed to them, *Re Sexton Barn's Settled Estates*, 10 W. R. 415. New trustees appointed.

(*k*) On the petition of a tenant for life, the remainderman consenting, the Court ordered part of the proceeds of a sale under the Act to be invested in mortgage security, *Wall* v. *Hall*, 11 W. R. 298; see note (*j*), to 23 & 24 Vict. c. 38, s. 10 (p. 290), *post*. Proceeds of sales invested.

(*l*) See notes to sect. 69 of the Lands Clauses Act, *ante*, p. 36. Payment.

XXIV. The application of the money in manner aforesaid (*m*) may, if the Court shall so direct, be made by the Trustees may apply monies in certain

19 & 20 Vict. c. 120, s. 24.

cases without application to Court.

trustees (if any) without any application to the Court (*n*), or otherwise upon an order of the Court upon the petition of the person who would be entitled to the possession or the receipt of the rents and profits of the land if the money had been invested in the purchase of land.

Reinvestment.

(*m*) Upon an application for the re-investment of money under this section, it is not necessary to serve the persons who were required to be served with all the notices required on a petition for sale (*Re Duke of Cleveland's Harte Estates*, 1 Dr. & Sm. 481; followed in *Re Sexton Barn's Settled Estates*, 10 W. R. 416).

(*n*) See *Re Peacock's Settled Estates*, 15 W. R. 100.

Until money can be applied, to be invested, and dividends to be paid to parties entitled.

XXV. Until the money can be applied as aforesaid, the same shall be from time to time invested in Exchequer Bills, or in Three per Centum Consolidated Bank Annuities, as the Court shall think fit; and the interest and dividends of such Exchequer Bills or Bank Annuities shall be paid to the person who would have been entitled to the rents and profits of the land if the money had been invested in the purchase of land.

Court may exercise powers repeatedly, but may not exercise them if expressly negatived.

XXVI. The Court shall be at liberty to exercise any of the powers conferred on it by this Act, whether the Court shall have already exercised any of the powers conferred by this Act in respect of the same property or not; but no such powers shall be exercised if an express declaration or manifest intention that they shall not be exercised is contained in the settlement, or may reasonably be inferred therefrom (*o*), or from extrinsic circumstances or evidence: Provided always that the circumstance of the settlement containing powers to effect similar purposes shall not preclude the Court from exercising any of the powers conferred by this Act, if it shall think that the powers contained in the settlement ought to be extended.

[Where settlement contains *similar* power.]

Lease ordered though settlement contained power to sell.

Consent.

(*o*) The existence of a power of sale in the settlement is not a sufficient manifestation of intention within this section to preclude the Court from ordering a sale under the Act (*Re Thompson's Settled Estates*, Johns. 424; and see *Grey* v. *Jenkins*, 26 Beav. 351).

Where a power is only to be exercised with certain consent, the Court will not dispense with such consent, even though it be arbitrarily (but not maliciously) refused, *Re Hurle's Settled Estates*, 2 H. & M. 196, and see note (*z*), *supra*.

19 & 20 Vict. c. 120, s. 27.

Court not to authorise any act which could not have been authorised by the settlor.

XXVII. Nothing in this Act shall be construed to empower the Court to authorise any lease, sale, or other act beyond the extent to which in the opinion of the Court the same might have been authorised in and by the settlement by the settlor or settlors.

Acts of the Court in professed pursuance of this Act, not to be invalidated.

XXVIII. After the completion of any lease or sale, or other act, under the authority of the Court, and purporting to be in pursuance of this Act, the same shall not be invalidated on the ground that the Court was not hereby empowered to authorise the same; except that no such lease, sale, or other act shall have any effect against any person whose concurrence in or consent to the application ought to have been obtained, and was not obtained (*p*).

Effect of conveyance.

(*p*) It seems that if the purchaser once got his conveyance under this Act, his title, except as mentioned in the text, would be unimpeachable (*Re Thompson's Settled Estates*, Johns. 422; per V.-C. Wood; but see *Re Burdin* or *Bardin*, 5 Jur. N. S. 1378. It is competent for the purchaser at any time before the completion to point out to the Court that it is exceeding its jurisdiction under the Act (*Re Thompson's Settled Estates*, l. c.). See, now, the Land Transfer Act, 1862, sect. 49, *post*, p. 318, authorising sales with an indefeasible title.

Costs.

XXIX. It shall be lawful for the Court, if it shall think fit, to order that all or any costs (*q*) or expenses of all or any parties of and incident to any application under this Act shall be a charge on the hereditaments which are the subject of the application, or on any other hereditaments included in the same settlement, and subject to the same limitations; and the Court may also direct that such costs and expenses shall be raised by sale or mortgage of a sufficient part of such hereditaments, or out of the rents or profits thereof, such costs and expenses to be taxed as the Court shall direct.

Costs.

(*q*) As to the costs of applications intended to benefit estates to which different persons are successively entitled, see *Re Parby's Settlement*, 29 L. T. 72; and see *Re Marner*, cited p. 69, *ante*, and note (*h*), *ante*, p. 109.

Power to Lord Chancellor, &c., to make rules and orders.

XXX. The Lord Chancellor of Great Britain, with the advice and assistance of the English Master of the Rolls, the Lords Justices of the Court of Appeal in Chancery, and the Vice Chancellors, or of any three of them, so far as relates to proceedings in England, and the Lord

19 & 20 Vict. c. 120, s. 30.

Chancellor of Ireland, with the advice and assistance of the Irish Master of the Rolls, and of the Lord Justice of the Court of Appeal in Chancery in Ireland, or of any two of them so far as relates to proceedings in Ireland, may, if he shall think fit, from time to time make general rules and orders for carrying the purposes of this Act into effect, and for regulating the times and form and mode of procedure, and generally the practice of the Court in respect of the matters to which this Act relates, and for regulating the fees and allowances to all officers and solicitors of the Court in respect to such matters; and such rules and orders may from time to time be rescinded or altered by the like authorities respectively; and all such rules and orders shall take effect as general orders of the Court (*r*).

(*r*) See Ord. XLI. 14—25, and 23rd Regul. as to business, Aug. 1857, 21—23, Appendix, p. lvi., lvii., *post*.

Rules and orders to be laid before Parliament.

XXXI. All general rules and orders made as aforesaid shall, immediately after the making and issuing thereof, be laid before both Houses of Parliament, if Parliament be then sitting, or if Parliament be not then sitting, within twenty-one days after the next meeting thereof; and it shall be lawful for either of the Houses of Parliament, by any resolution passed within thirty-six days after such rules or orders have been laid before it, to resolve that the same or any part thereof ought not to continue in force, and thereupon the same shall cease to be binding.

Tenants for life, &c., may grant leases for twenty-one years.

XXXII. It shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any settled estates for an estate for life, or for a term of years determinable with his life, or for any greater estate, either in his own right or in the right of his wife, unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise; and also for any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as tenant by the courtesy, or in dower,

or in right of a wife who is seised in fee, without any application to the Court, to demise the same or any part thereof, except the principal mansion-house and demesnes thereof, and other lands usually occupied therewith, from time to time, for any term not exceeding twenty-one years to take effect in possession, provided that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion; and provided that such demise be not made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and also a condition of re-entry on non-payment for a period not less than twenty-eight days of the rent thereby reserved, and on non-observance of any of the covenants or conditions therein contained; and provided a counterpart of every deed of lease be executed by the lessee (*s*). 19 & 20 Vict. c. 120, s. 32.

(*s*) See as to this section, Sugden on Powers, and Davidson iii., 437.

XXXIII. Every demise authorised by the last preceding section shall be valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person under or by virtue of the same settlement, if the estates be settled, and in the case of unsettled estates against all persons claiming through or under the wife or husband (as the case may be) of the person granting the same (*t*). Against whom such leases shall be valid.

(*t*) Such leases are now, by the 21 & 22 Vict. c. 77, s. 8, p. 257, *post*, valid, "against the wife of any husband making such demise of estates to which he is entitled in right of his wife." Leases valid against wife.

XXXIV. The execution of any lease by the lessor or lessors shall be deemed sufficient evidence that a counterpart of such lease has been duly executed by the lessee as required by this Act. Evidence of execution of lease by lessee.

XXXV. The Act of the thirty-second year of King Henry the Eighth, chapter twenty-eight, intituled, "Lessees to enjoy the farm against the tenant in tail," Repeal of 32 Hen. 8, c. 28, and 10 Car. 1, sess. 3, c. 6

19 & 20 Vict. c. 120, s. 35.

(Ireland), except as to ecclesiastical leases.

and the Act of the Parliament of Ireland of the tenth year of King Charles the First, session three, chapter six, intituled, "An Act that lessees shall enjoy their farms against tenants in tail or in right of their wives etc.," are hereby repealed, except so far as relates to leases made by persons having an estate in the right of their churches.

Provision as to infants, lunatics, &c.

XXXVI. All powers given by this Act, and all applications to the Court under this Act, and consents to such applications, may be exercised, made, or given by guardians on behalf of the infants (*u*), and by committees on behalf of lunatics (*v*), and by assignees of bankrupts or insolvents: Provided nevertheless, that in the cases of infant or lunatic tenants in tail no application to the Court, or consent to any application, may be made or given by any guardian or committee without the special direction of the Court (*w*).

Guardian how and when appointed.

(*u*) As to appointing a guardian to apply or consent by summons in chambers and the evidence required, see 21st Regul. as to business, Aug. 8, 1857, Appendix, p. lvi., *post*. In case the guardian has to *apply* he must be appointed before the petition is *presented*, *ibid.*, but see *Re Hargreave's Settled Estates*, 7 W. R. 156, where it was held that the guardian may be appointed *at any time before the petition is heard*; *Re Longstaffe's Settled Estates*, 1 Drew. & Sm. 142; and see the cases cited in note (*x*), *infra*.

Where the guardian has only to *consent* to an application, he may be appointed either before or after the petition is presented, *Re Hargreave's Settled Estates*, l. c. A guardian must be appointed even though the father of the infant having no adverse interest concurs (*Re Caddick's Settled Estates*, 7 W. R. 334).

(*v*) See 22nd Regul. as to business, Aug. 8, 1857, Appendix, p. lvi., *post*.

(*w*) Such special directions may be obtained by *ex parte* summons, Ord. XLI. 23, *post*; see p. 147, *ante*.

A married woman applying to the Court to be examined apart from her husband.

XXXVII. Where a married woman shall apply to the Court, or consent to an application to the Court, under this Act, she shall first be examined apart from her husband (*x*), touching her knowledge of the nature and effect of the application, and it shall be ascertained that she freely desires to make or consent to such application; and such examination shall be made whether the hereditaments which are the subject of the application shall be settled in trust for the separate use of such married woman independently of her husband, or not; and no clause or provision in any settlement restraining antici-

No clause, &c., in settlement restraining an-

pation shall prevent the Court from exercising, if it shall think fit, any of the powers given by this Act, and no such exercise shall occasion any forfeiture, anything in the settlement contained to the contrary notwithstanding.

19 & 20 Vict. c. 120, s. 37.

Anticipation to prevent Court from exercising powers of this Act.

(*x*) A married woman petitioning should be examined before any judicial step is taken.

When married women should be examined.

A married woman *consenting* to an application may be examined under this section at any time up to the hearing of the petition, or her consent may be taken in court on the petition coming on to be heard, see *Re Forster's Settled Estates*, 24 Beav. 220; 1 De G. & J. 386. Advertisements issued previously to the obtaining such consent are therefore valid (*ibid.*), overruling the older cases on this point; but see Daniell, 1813.

When a woman married after the petition was presented, but before any proceedings were taken under it, the Master of the Rolls held that she must be examined under this section (*Re Cundee's Estates*, Nov. 11, 1859); but where a married woman's interest was remote, she was represented by trustees, her examination was dispensed with, *Re Lord de Tabley's Settled Estates*, 11 W. R. 936.

After order made.

In *Re Turbut*, 8 L. T. N. S. 657 (where it was held that a married woman entitled to a *jointure* charged on settled estates must be examined under this section), her examination was ordered after the order was made upon the petition, but before it was drawn up, the petition being ordered to be mentioned again after the examination (V.-C. Wood).

XXXVIII. The examination of such married woman shall be made either by the Court or by some solicitor (*y*) duly appointed by the Court for that purpose (*z*), who shall certify, under his hand, that he has examined her apart from her husband, and is satisfied that she is aware of the nature and effect of the intended application, and that she freely desires to make or consent to the same.

Such examination to be either by the Court or by a solicitor.

Who may take her examination.

(*y*) The solicitor appointed to take the examination should not be the solicitor acting in the matter (*Re Brealy's Settled Estates*, 5 W. R. 613; and cf. *Hopkins* v. *Hopkins*, 10 Hare, App. ii.), or the solicitor of the husband (*Re Noyes' Settled Estates*, 6 W. R. 7); and no person connected with the husband should be allowed to be present during the examination (*Re Bendyshe*, 3 Jur. N. S. 727). He must be a solicitor actually taking out a certificate *de anno in annum*, although he may be practising in a foreign country (*ibid.*) It is now provided that when the married woman *resides abroad*, any person, whether a solicitor or not, may be appointed. See sect. 6 of the Amendment Act, 1858, p. 256, *post*.

(*z*) The section does not authorise a commission (*Re Noyes' Settled Estates*, 6 W. R. 7; and see *Turner* v. *Turner*, 6 W. R. 95).

XXXIX. Subject to such examination as aforesaid, married women may make or consent to any applications, whether they be of full age or infants.

As to consent of married women under age.

XL. Nothing in this Act shall be construed to create any obligation at law or in equity on any person to make

No equity to compel any one to apply to the Court.

19 & 20 Vict. c. 120, s. 40.

or consent to any application to the Court, or to exercise any power.

Tenants for life, &c., may exercise powers notwithstanding incumbrances.

XLI. For the purposes of this Act, a person shall be deemed to be entitled to the possessions or to the receipt of the rents and profits of estates, although his estate may be charged or incumbered either by himself or by the settlor, or otherwise howsoever, to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and profits as aforesaid, unless they shall concur therein.

Exception as to entails created by Acts of Parliament.

XLII. Provided always, that nothing in this Act shall authorise any sale or lease beyond the term of twenty-one years of any settled estates in which under the Act of the twenty-fourth and twenty-fifth years of King Henry the Eighth, chapter twenty, "to embar feigned recovery of lands wherein the King is in reversion," or under any other Act of Parliament, the tenants in tail are restrained from barring or defeating their estates tail, or where the reversion is vested in the Crown.

Saving rights of lords of manors.

XLIII. Nothing in this Act shall authorise the granting of a lease of any copyhold or customary hereditaments not warranted by the custom of the manor without the consent of the lord, nor otherwise prejudice or affect the rights of any lord of a manor.

To what settlements this Act to extend.

XLIV. The provisions of this Act shall extend to all settlements, whether made before or after it shall come in force, except those as to demises to be made without application to the Court, which shall extend only to settlements made after this Act shall come in force.

Extent of Act.

XLV. This Act shall not extend to Scotland.

Commencement of Act.

XLVI. This Act shall come in force on the first day of November, one thousand eight hundred and fifty-six.

LEASES AND SALES OF SETTLED ESTATES AMENDMENT ACT, 1858.

21 & 22 VICT. CAP. 77.

An Act to amend and extend the Settled Estates Act of 1856. [*2nd August*, 1858.

WHEREAS it is expedient to amend and extend the Settled Estates Act of 1856 (nineteenth and twentieth Victoria, chapter one hundred and twenty) in certain particulars: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

21 & 22 Vict. c. 77.
19 & 20 Vict. c. 120.

I. For the purposes of the definitions of "settlement" and "settled estates" contained in the first section of the said Act, all estates or interests in remainder or reversion not disposed of by the settlement, and reverting to a settlor, or descending to the heir of a testator, shall be deemed to be estates, coming to such settlor or heir under or by virtue of the settlement (*a*).

Definitions of "Settlement" and "Settled Estates."

(*a*) See note (*b*), p. 237, *ante*.

II. The term "building lease" in the said Act (*b*) shall be deemed to include a repairing lease, so that no repairing lease shall be made for a term exceeding sixty years (*b*).

"Building lease" to include repairing lease.

(*b*) See note (*c*), p. 239, *ante*.

III. All the powers to authorise and to grant leases contained in the said Act and this Act shall be deemed to include powers to the lords of settled manors to give licences to their copyhold (*c*) or customary tenants to grant leases of lands held by them of such manors to the same extent and for the same purposes as leases may be authorised or granted of freehold hereditaments under the said Act and this Act.

Powers of leasing to extend to copyhold and customary tenants of manors.

(*c*) See note (*b*), p. 237, *ante*.

21 & 22 Vict. c. 77, s. 4.

Extension of power under section 2 of recited Act as to term for building leases.

IV. The power given to the Court by the second section of the said Act to extend the term thereby prescribed for building leases, where it shall be satisfied that it is the usual custom of the district, and beneficial to the inheritance, to grant building leases for longer terms, shall be extended and may be exercised with respect to all the other leases in the same section mentioned, except agricultural leases, provided the Court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant such leases for longer terms (*d*).

(*d*) See note (*f*), p. 239, *ante*.

As to surrender of leases.

V. The power conferred by the fifth section of the said Act to surrender leases granted under the provisions of the said Act shall be deemed to extend to all leases, whether granted in pursuance of the said Act or otherwise (*e*).

(*e*) See note (*l*), p. 240, *ante*.

As to taking examinations of married women.

VI. Whenever a married woman is resident out of the jurisdiction of the Court of Chancery of England or the Court of Chancery of Ireland respectively, as the case may be, her examination, under the thirty-eighth section of the Act, may be made by any person appointed for that purpose by the Court, whether he is or is not a solicitor of the court; and the appointment of any such person, not being a solicitor, shall afford conclusive evidence that the married woman was at the time of such examination resident out of the jurisdiction of the Court (*f*).

(*f*) See note (*y*), p. 253, *ante*.

Extension of power to rescind general rules and orders.

VII. The powers contained in the said Act to make and rescind general rules and orders shall extend to the matters to which this Act relates; and such rules and orders may, so far as may be found expedient, alter the procedure prescribed by the said Act and this Act (*g*).

(*g*) See Ord. XLI. 14—25, *post*.

VIII. In addition to the persons expressly enumerated in the thirty-third section of the said Act against whom demises authorized by the thirty-second section are to be valid, such demises, in the case of unsettled estates, shall be valid against the wife of any husband making such demise of estates to which he is entitled in right of such wife (*h*). 21 & 22 Vict. c. 77, s. 8. As to validity of demises under section 33 of recited Act.

(*h*) See note (*t*), p. 251, *ante*.

CONFIRMATION OF SALES ACT.

25 & 26 VICT. CAP. 108.

[See page 259, *post*.]

LEASES AND SALES OF SETTLED ESTATES FURTHER AMENDMENT ACT, 1864.

27 & 28 VICT. CAP. 45.

An Act to further amend the Settled Estates Act of 1856.

[14*th July*, 1864.

WHEREAS by the tenth section of the Act passed in the Parliament holden in the nineteenth and twentieth years of Her Majesty's reign, intituled "An Act to facilitate Leases and Sales of Settled Estates," it was enacted, that when the Court of Chancery should deem it expedient that any general powers of leasing any settled estates, conformably to the said Act, should be vested in trustees, it might, by order, vest any such power accordingly either in the existing trustees of the settlement or in any other persons, and that in every such case the Court, if it should think fit, might impose any conditions as to consents or otherwise on the exercise of such power: And whereas, in order to protect the interests of persons interested in the settled estates affected by such powers, the practice of the said Court has been to require that 27 & 28 Vict. c. 45. 19 & 20 Vict. c. 120.

27 & 28 Vict. c. 45.

leases granted in pursuance of a power vested in any trustees or other persons, under the provisions of the said tenth section of the said Act, should be settled by the said Court or by a judge thereof, or otherwise should be made conformable with a model lease deposited in the chambers of the judge: And whereas the introduction of such a condition has been found to occasion delay and expense, and so to create great difficulties in carrying into execution the objects of the Act, and such conditions may in general be safely omitted, and it is therefore expedient that the said Act should be amended as hereinafter mentioned: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Conditions that leases shall be settled by the Court not to be inserted in orders under sect. 10 of recited Act.

I. In orders to be hereafter made under the said tenth section for vesting any powers of leasing in any trustees or other persons, no condition shall be inserted requiring that the leases thereby authorized should be submitted to or be settled by the said Court or a judge thereof, or be made conformable with a model lease deposited in the judge's chambers (*a*), save only in any case in which the parties applying for the order may desire to have any such condition inserted, or in which it shall appear to the Court that there is some special reason rendering the insertion of such a condition necessary or expedient.

(*a*) See note (*n*), p. 241, *ante*.

Conditions already inserted may be struck out by Court.

II. In all cases of orders already made in pursuance of the said tenth section, in which any such condition as aforesaid has been inserted, it shall be lawful for any party interested to apply to the Court to alter and amend such order, by striking out such condition, and the Court shall have full power to alter the same accordingly, and the order so altered shall have the same validity as if it had originally been made in its altered state (*b*); but nothing herein contained shall make it obligatory on the Court to act under this clause in any case in which from the evidence which was before it when the order sought to be

altered was made, or from any other evidence, it shall appear to the Court that there is any special reason why in the case in question such a condition is necessary or expedient. 27 & 28 Vict. c. 45, s. 2.

(*b*) See note (*n*), p. 241, *ante*.

III. And whereas doubts are entertained whether in the construction of the first section of the said Act the Court is bound by the state of facts existing at the period of the settlement taking effect, or by the state of facts at the time of an application to the Court under the said Act, and it is desirable that such doubts should be removed: Be it enacted, that the said Court, in determining what are settled estates within the said Act, shall be governed by the state of facts and by the trusts or limitations of the settlement at the time of the said settlement taking effect (*c*). Removal of doubts as to construction of sect. 1 of recited Act.

(*c*) See note (*b*), p. 237, *ante*.

IV. This Act shall be construed and dealt with as part of the said former Act as amended by the Act of the twenty-first and twenty-second years of Her Majesty's reign, chapter seventy-seven, and all proceedings under this Act shall be subject to the same rules and orders, and shall be conducted in the same manner, as proceedings under the said former Acts. Act to be construed with recited Act.

V. This Act shall extend to *Ireland* but not to *Scotland*. xtent of Act.

CONFIRMATION OF SALES ACT.

25 & 26 VICT. CAP. 108.

An Act to confirm certain Sales, Exchanges, Partitions and Enfranchisements by Trustees and others.

[*7th August*, 1862.

[Section 1 of this Act confirmed sales previously made apart from minerals, and not then impeached by any suit].

II. AND whereas it is expedient that trusts and powers to dispose of land by way of sale, exchange, partition, or enfranchisement should be extended in the 25 & 26 Vict. c. 108, s. 2. Trustees may dispose of land or minerals

25 & 26 Vict. c. 108, s. 2.

separately without the residue, &c.

manner hereinafter appearing: Every trustee and other person now or hereafter to become authorized to dispose of land by way of sale, exchange, partition, or enfranchisement may, unless forbidden by the instrument creating the trust or power, so dispose of such land with an exception or reservation of any minerals and with or without rights and powers of or incidental to the working, getting, or carrying away of such minerals (*a*), or may (unless forbidden as aforesaid) dispose of by way of sale, exchange, or partition, the minerals with or without such rights or powers, separately from the residue of the land, and in either case without prejudice to any future exercise of the authority with respect to the excepted minerals or (as the case may be) the undisposed-of land; but this enactment shall not enable any such disposition as aforesaid without the previous sanction of the Court of Chancery to be obtained on petition in a summary way of the trustee (*b*) or other person authorized as aforesaid, which sanction once obtained shall extend to the enabling from time to time of any disposition within this enactment of any part or parts of the land comprised in the order to be made on such petition without the necessity of any further or other application to the Court (*c*).

Sanction of Court of Chancery requisite.

Sales apart from minerals.

Cestuis que trusts should be served.

Court will authorize sales generally.

(*a*) The Court had previously *under the Settled Estates Act* allowed sales of land apart from the minerals; note (*p*), p. 242, *ante*.

(*b*) The persons beneficially interested should be served, *Re Brown*, 11 W. R. 19.

(*c*) The Court has made an order on petition authorizing sales of land apart from minerals, generally and without reference to any particular sale, *Re Williway*, 32 L. J. Ch. 226.

Extent of Act.

III. This Act shall not extend to Ireland or Scotland.

CHANCERY AMENDMENT ACT, 1858.

21 & 22 VICT. CAP. 27.

An Act to amend the Course of Procedure in the High Court of Chancery, the Court of Chancery in Ireland, and the Court of Chancery of the County Palatine of Lancaster. [28*th June*, 1858.

21 & 22 Vict. c. 27.

WHEREAS it is expedient to amend further the practice and course of proceeding in the High Court of Chancery, the Court of Chancery in Ireland, and the Court of Chancery of the County Palatine of Lancaster: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Commencement of Act.

Short title.

I. (*a*) This Act shall commence and take effect from and after the first day of November, one thousand eight hundred and fifty-eight, and may be cited and referred to as "The Chancery Amendment Act, 1858."

Act not retrospective.

(*a*) The Act is not retrospective (*Wicks* v. *Hunt*, Johns. 380), but it would seem from the case of *Nelson* v. *Bridges*, 2 Beav. 239 (and see *Prothero* v. *Phelps*, 25 L. J. Ch. 105; and *Lillie* v. *Legh*, 3 De G. & J. 204; *Gedye* v. *Duke of Montrose*, 26 Beav. 45), that even before the passing of this Act Courts of Equity had inherent jurisdiction to award damages for the non-performance of an agreement which they were empowered to enforce. See Sugden's Vendors, 233.

Power to Court of Chancery to award damages in certain cases.

II. In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct (*b*).

Damages granted though not asked for by bill.

(*b*) As to the mode of assessment, see note to next section. Damages were granted, though not asked for by the prayer of the bill, *Catton* v. *Wyld*, 32 Beav. 266; *Curriers' Company* v. *Corbet*, 2 Dr. & Sm. 355; but if a *decree has been made* giving equitable relief, a *supplemental* question as to damages will not be entertained without a supplemental bill, *Corporation of Hythe* v. *East*, 1 L. R. Eq. 620. See *Needham* v. *Oxley*, 11 W. R. 745.

Sir J. Rolt's Chancery Regulation Act, sect. 1 (*post*, p. 270), enacts that the Court *shall* determine every question of law or fact cognizable in a Court of

21 & 22 Vict. c. 27, s. 2.

Common Law, on the determination of which the plaintiff's title to relief in equity depends.

The Court *shall* determine, &c., except where matter improperly brought into equity.

But, even if the question of a plaintiff's right to damages can be held to come within these words (as to which see *Johnson* v. *Wyatt*, 2 D. J. S. 18), yet there is a reservation in the 4th section of Sir J. Rolt's Act, that the Court need not decide purely legal questions where the matter has been improperly brought into equity, and, though in *Johnson* v. *Wyatt* (l. c.), the Lords Justices, having regard to the spirit of the later Act, after refusing an injunction, entered into the question of damages, and ultimately refused them, it has generally been held that Sir J. Rolt's Act has made no difference in the principles of the Court as to damages.

The matter must have been proper to be brought into Court of equity,

It is now settled that the question of damages will not be entertained, except in cases where the Court has jurisdiction irrespectively of any right to them, *Hindley* v. *Emery*, 1 L. R. Eq. 52; *Durell* v. *Pritchard*, 1 L. R. Ch. 244; *Swaine* v. *Great Northern Railway Company*, 12 W. R. 391; *Lewers* v. *Earl of Shaftesbury*, 2 L. R. Eq. 270; *Wedmore* v. *Corporation of Bristol*, 11 W. R. 136, where the Court refused to direct an inquiry as to damages on an interlocutory application, and see note (*c*) to sect. 42 of the Master in Chancery Abolition Act, p. 159, *ante*.

at the time when the bill was filed.

The question always is whether the jurisdiction existed at the time of *the filing of the bill*, for if it did, the Court will entertain the question of damages at the hearing, though something occurs *during the litigation* which prevents the jurisdiction attaching at the hearing, *e.g.*, though the plaintiff's subsequent laches disentitles him to the equitable relief, *Eastwood* v. *Lever*, 33 L. J. Ch. 355; or though a patent, in respect of which an injunction is prayed, has expired since the bill was filed, *Davenport* v. *Rylands*, 1 L. R. Eq. 302; or the defendant has submitted to the equitable relief, *Cory* v. *Thames Iron Company*, 11 W. R. 589; see *Catton* v. *Wyld*, 32 Beav. 263; but in a similar case the Court will not declare a legal right: see next note.

(1) Cases where the Court having no jurisdiction to grant equitable relief, refuses to entertain the question of damages;

(1) The following are instances in which the Court has refused to entertain the question of damages, owing to the question having been improperly brought into equity:—

Where damages were sought in respect of an agreement which could not be specifically performed—*e.g.*, where the defendant had agreed to accept a lease of land so soon as he (the defendant) had completed certain buildings thereon, and such condition precedent had never been performed, *Norris* v. *Jackson*, 1 J. & H. 319; but compare *Middleton* v. *Greenwood*, 2 D. J. S. 142; where, under similar circumstances the plaintiff waived the condition precedent, and was held entitled to specific performance with damages. See also *Soames* v. *Edge*, John. 669; *Middleton* v. *Magnay*, 2 H. & M. 233; *Samuda* v. *Lawford*, 4 Giff. 42.

e.g. on account of uncertainty of agreement;

Again, where the plaintiff prayed that a resolution of directors allotting him certain shares might be specifically performed, but it appeared that all the shares had been otherwise allotted, it was held that the plaintiff could not have a decree for indemnity out of the directors' own shares, this being a claim for damages in another form, *Ferguson* v. *Wilson*, 2 L. R. Ch. 77. See, too, *Rogers* v. *Challis*, 27 Beav. 175; *Lewers* v. *Earl Shaftesbury*, 2 L. R. Eq. 270. And when any essential particular in the agreement is left to the decision of arbitrators or a referee, or the agreement is otherwise void for uncertainty, no damages will be given, *Tillett* v. *Charing Cross Bridge Company*, 26 Beav. 419; *Darby* v. *Whittaker*, 4 Drew. 134; *Lancaster* v. *De Trafford*, 10 W. R. 474.

or plaintiff's laches;

And though the contract be one which might have been specifically enforced in equity, if the plaintiff does any act which disentitles him to specific performance, he will not be entitled to damages, *Collins* v. *Stutely*, 7 W. R. 710; *Bauman* v. *Matthews*, 4 L. T. N. S. 784; but see *Eastwood* v. *Lever*, and other cases cited *supra*, and *Senior* v. *Pawson*, *infra*.

but dismisses the bill without prejudice to an action.

So if the inquiry complained of is so *trivial* that the Court considers that the matter was improperly brought into equity, no inquiry as to damages is directed, *Clarke* v. *Clark*, 1 L. R. Ch. 16; *Durell* v. *Pritchard*, *ibid.* 244; *Curriers' Company* v. *Corbet*, 13 W. R. 1056; overruling s. c. 2 Dr. & Sm. 355; but the dismissal will be without prejudice to the plaintiff's right (if

any) to bring an action at law, *Robson* v. *Whittingham*, 1 L. R. Ch. 442.

(2) If the Court has jurisdiction to entertain a suit for specific performance, or injunction independently of the plaintiff's right to damages, it also will assess damages for breaches of covenant in respect of the same transaction, the intention of the Act being to give the Court power to grant complete relief wherever it has a well founded jurisdiction to entertain the case, and not to compel a plaintiff to seek partial relief in one Court, and then turn him over to another to seek supplemental relief, *Hindley* v. *Emery*, 1 L. R. Eq. 52; but see *Corporation of Hythe* v. *East*, cited in note (*b*), p. 261.

(2) Cases where the Court having jurisdiction to grant equitable relief, grants *damages in addition*;

But even where the Court has jurisdiction to give equitable relief, it will not always restrain the plaintiff from obtaining relief in the shape of damages at law in respect of the same transaction, provided the action and the suit, though arising from the same transaction, are for different objects; thus, though a plaintiff cannot obtain specific performance of an agreement in equity, and at the same time get damages at law for breach of the same agreement, (*Hindley* v. *Emery*, l. c.), yet where B. had agreed to deliver ships to A. by a certain time, in consideration of which contract A. gave B. bills of exchange, and B. never performed the contract, it was held that A. might have a decree in equity to cancel the bills of exchange, and at the same time might sue at law for damages in respect of the breach of contract, *which could not be specifically performed*, *Anglo-Danubian Company* v. *Rogerson*, 4 L. R. Eq. 3.

but will not always restrain the plaintiff from suing at law for damages.

(3) In many cases where there is sufficient foundation for the Court's jurisdiction, damages may be granted in substitution for equitable relief: *e.g.* if the plaintiff has been guilty of laches, *Senior* v. *Pawson*, 3 L. R. Eq. 330; or if a mandatory injunction would be very injurious to the defendant without corresponding benefit to the plaintiff, *Jackson* v. *Duke of Newcastle*, 12 W. R. 450; see remarks of Lord Romilly, M. R., in *Tillett* v. *Charing Cross Bridge Company*, 26 Beav. 419; and in *Schotsmans* v. *Lancashire and Yorkshire Railway Company*, 1 L. R. Eq. 399, (this case was reversed on another point, 2 L. R. Ch. 332); and see *Martin* v. *Headon*, 2 L. R. Eq. 425; *Isenberg* v. *East India House Estate Company*, 12 W. R. 450; *Durell* v. *Pritchard*, 1 L. R. Ch. 244; and *Frankliske* v. *Ball*, 33 Beav. 560; where Lord Romilly said that if a mortgagee agreed to lease, but could not obtain the mortgagor's consent, so that by leasing he would make himself liable as mortgagee in possession, then, on a suit for specific performance, damages would be the proper remedy; and see the converse case in *Howe* v. *Hunt*, 31 Beav. 420. So where circumstances happened after the filing of the bill, making an injunction impossible, *Catton* v. *Wyld*, 32 Beav. 266; *Davenport* v. *Rylands*, 1 L. R. Eq. 302; *Cory* v. *Thames Iron Works Company*, 11 W. R. 589.

(3) Cases where the Court having jurisdiction to grant equitable relief has granted *damages in substitution* for other relief, as the more appropriate remedy.

And where the injury complained of was done by the defendants acting under parliamentary authority, damages were granted in place of an injunction, *Wedmore* v. *Mayor of Bristol*, 11 W. R. 136.

III. It shall be lawful for the Court of Chancery, if it shall think fit, to cause the amount of such damages in any case to be assessed (*c*) or any question of fact arising in any suit or proceeding to be tried by a special or common jury before the Court itself (*d*), and the Court of Chancery may make all such rules and orders upon the sheriff or any other person for procuring the attendance of a special (*e*) or common jury, for such assessment of damages or the trial of such question of fact, as may be made by any of the Superior Courts of Common Law at Westminster, and may also make any other orders

Damages may be assessed, or question of fact arising in any suit may be tried by a jury before the Court itself.

21 & 22 Vict. c. 27, s. 3.

which to the Court of Chancery may seem requisite (*f*); and every such jury shall consist of persons possessing the qualifications, and shall be struck, summoned, balloted for, and called in like manner, as if such jury were a jury for the trial of any cause in any of the said Superior Courts; and every juryman so summoned shall be entitled to the same rights, and subject to the same duties and liabilities as if he had been duly summoned for the trial of any such cause in any of the said Superior Courts; and every party to any such proceeding shall be entitled to the same rights, as to challenge and otherwise, as if he were a party to any such cause; and generally for all purposes of or auxiliary to the assessment of damages, or the trial of questions of fact by a jury before the Court itself, and in respect of new trials (*g*), the Court of Chancery shall have the same jurisdiction, powers, and authority in all respects as belong to any Superior Court of Common Law, or to any judge thereof for the like purposes: Provided that from any order made by the Court on an application made for a new trial, there shall be the same right of appeal as from any other order of the Court.

Mode of assessment of damages.

(*c*) For the form of inquiry as to damage in the case of infringement of a patent, see *Davenport* v. *Rylands*, 1 L. R. Eq. 302; in case of unlawful use of a trade-mark, *Leather Cloth Company* v. *Hirschfield*, (*ibid.* 299). An inquiry as to extraordinary damage, on the ground that the plaintiff could have made additional profit by letting a house during the London season was refused, *Chinnock* v. *Marchioness of Ely*, 2 H. & M. 220; *Mold* v. *Wheatcroft*, 27 Beav. 510.

As to whether damages claimed on account of abuse of the process of the Court should be assessed in equity or at common law, see *Whitehead* v. *Lynes*, 34 Beav. 165; on appeal, 12 L. T. N. S. 332.

QUESTIONS OF LAW OR FACT.

(*d*) Formerly when a question of law or fact arose, necessary to the decision of the equitable question at issue, the practice was to direct a case to be stated for the opinion of a court of law on the point of law, or to direct an issue as to the question of fact, or to direct an action if the proceedings involved a mixed question of law or fact.

1. On *questions of law* judge may be called in, and cases as to points of law are not to be stated;

The 61st & 62nd sections of 15 & 16 Vict. c. 86 (p. 224, *ante*), gave the Court power to determine the legal title of any party seeking relief, and abolished the practice of stating cases as to points of law; but for the purpose of determining questions of law, the Court may require the assistance of a common law judge, by 14 & 15 Vict. c. 83, s. 5, note (*d*), (p. 138, *ante*).

except for opinion of civilians, colonial courts, &c.

The Court may still state a case for the opinion of civilians, (*Sayre* v. *Cramp*, 2 W. R. 438); or of a Scotch advocate, *McCormick* v. *Garnett*, 5 D. M. G. 278; or of a Court in another part of her Majesty's dominions, see 22 & 23 Vict. c. 63, s. 1, *Lord* v. *Colvin*, 1 Dr. & Sm. 24; *Wilson* v. *Moore*, 12 W. R. 1137; and compare *Brodie* v. *Johnson*, 30 Beav. 129; *Login* v. *Princess of Coorg*, *ibid.* 632]; where cases were stated in colonial courts under that Act for the opinion of the Court of Chancery.

Lord Cairns' Act, by the section in the text, and sect. 5, *infra*, empowered the Court to try questions of fact before itself, with or without a jury. 21 & 22 Vict. c. 27, s. 3.

And Sir J. Rolt's Chancery Regulation Act, sect. 1, p. 270, *post*, enacts that the Court *shall* determine every question of law or fact incident to the relief sought, see *Re Hooper*, 11 W. R. 130; cited note (*y*), p. 127; *Fernie* v. *Young*, 1 L. R. Eng. and Ir. Ap. 63, 71, 79. And see note (*y*) to sect. 79 of the Lands Clauses Act, *ante*, p. 45. 2. *Questions of fact* to be tried before the Court;

But there are two reservations in Sir J. Rolt's Act, viz.: 25 & 26 Vict.

(A.) In sect. 2 (p. 271), which reserves the power to send an issue out of Chancery, where it is more convenient that it should be tried at the assizes, or in the superior court of common law. c. 42, s. 1; except (*a*) where issue more convenient,

(B.) In sect. 4, (p. 271), which provides that the Court need not decide a legal question where the matter has been improperly brought into equity.

(A.) The proviso reserving power to send an issue out of Chancery, is only to apply if the Court is satisfied that justice will be better done in the particular case by sending the issue to law, *Fernie* v. *Young*, l. c; where an order of V.-C. Stuart, directing an issue at law, was reversed on appeal.

It seems, however, that the Court will not ordinarily try a question of nuisance before itself, unless the acts complained of were done in London or Middlesex, *Eaden* v. *Firth*, 1 H. & M. 572. *e. g.* Cases of nuisance.

There may be an appeal on the question whether the trial shall be before the Court of Chancery, or in a court of common law, *Fernie* v. *Young*, l. c.; though on the question whether the judge will try the question with or without the assistance of a jury, there is no appeal, note (*y*), p. 266. Order directing issue to be tried in chancery may be appealed from.

(B.) As to the second proviso, that the Court need not decide a purely legal question, where the matter has been improperly brought into equity, compare the cases cited, p. 262, *supra*. (*β*) Where matter improperly brought into equity,

Where a plaintiff complained that his legal rights had been infringed, but it appeared that he had had ample opportunity to establish his right at law, the Court refused to interfere, or to try his legal right with a view to granting an injunction, *Swaine* v. *Great Northern Railway Company*, 12 W. R. 391; see *Davenport* v. *Goldberg*, 2 H. & M. 285; *Ward* v. *Higgs*, 4 N. R. 459; *Clarkson* v. *Edge*, 12 W. R. 518. *e. g.* where an action should have been brought or was pending.

A bill by an heir-at-law, to set aside a devise of real estate on the ground of fraud, was held to be demurrable, notwithstanding these Acts, *Jones* v. *Gregory*, 2 D. J. S. 83.

And where an action was pending as to the legal right in respect of which the plaintiff claimed an injunction, the Court refused to try the question before itself, *Griffiths* v. *Tanner*, 7 W. R. 322; *Curlewis* v. *Carter*, 12 W. R. 97; but an issue as to the novelty of a patent was directed, though the validity had been established at law against another defendant, *Bovill* v. *Goodier*, 2 L. R. Eq. 195. Patent cases.

In one case though, *when the bill was filed*, there was an equitable question to be tried, but the defendants, before decree, submitted to an injunction, the Court refused to make a declaratory decree as to the plaintiff's rights, *Attorney-General* v. *Boyle*, 12 W. R. 368; and see the principles of the Court as to declaratory decrees in note (*c*) to 15 & 16 Vict. c. 86, s. 50, p. 208; *Trustees of Birkenhead Docks* v. *Laird*, 4 D. M. G. 732; *Shrewsbury &c. Railway Company* v. *Stour Valley Railway Company*, 2 D. M. G. 866; (see, however, last note as to granting damages, although the defendants had submitted before decree). So where a bill prayed either for a declaration that, according to the true construction of a deed, certain property did not pass by it, or if it did pass by it, then that the deed might be reformed, the Court, being of opinion that the property did not pass, and therefore that no reformation was requisite, refused a declaratory decree, but *stated its opinion* in the decree, *Jenner* v. *Jenner*, 1 L. R. Eq. 361. How far, when the jurisdiction to grant equitable relief is gone, the Court will declare a legal right.

The Court will not allow the practice of granting issues to interfere with the plaintiff's right to have full discovery from the defendant, *Foxwell* v. *Webster*, 2 Dr. & Sm. 250; and see note (*a*) to Ord. XV. 1. Defendant must answer fully though an issue is granted.

For the form of record for trial, see Schedule N. Appendix, p. xxv. *post*. Form of record

A defendant will not be allowed to add a totally new issue of fact, not in any way suggested by his answer, to the issues already directed for the trial.

21 & 22 Vict. c. 27, s. 3.

for trial of question of fact.

In order to raise such issue, a supplemental answer should be filed, *Morgan* v. *Fuller*, 2 L. R. Eq. 296.

(*e*) Where a special jury is summoned, a direction to that effect must be contained in the order directing the trial, Ord. XLI. 27, *post*.

(*f*) See Ord. XLI. 26—52.

(*g*) For the practice relating to new trials of issues, whether tried with or without a jury, see note (*k*) to sect. 5.

Questions ordered to be tried by jury to be reduced into writing.

IV. Any question of fact, and any question as to the amount of damages which shall be so ordered to be tried by a jury before the Court itself, shall be reduced into writing in such form as the Court shall direct (*h*), and at the trial the jury shall be sworn to try the said question, and a true verdict to give thereon according to the evidence; and upon every such trial the Court of Chancery shall have the same powers, jurisdiction, and authority as belong to any judge of any of the said Superior Courts sitting at Nisi Prius.

(*h*) See Schedule N. Appendix, p. xxv. *post*.

Damages may be assessed or questions of fact tried before the Court itself without a jury.

V. It shall also be lawful for the Court of Chancery, if it shall think fit, to cause the amount of such damages in any case to be assessed, or any question of fact arising in any suit or proceeding to be tried before the Court itself without a jury (*i*), and to cause the evidence on the trial of that question to be taken by the oral examination of witnesses and other proofs in open court; and any question of fact, and any question as to the amount of damages which shall be so ordered to be tried before the Court itself, shall be reduced into writing in such form as the Court shall direct; and the verdict of the judge shall be of the same effect as the verdict of a jury under this Act; and the proceedings upon and after such trial, as to the power of the Court, the evidence, and otherwise, shall be the same as in the case of trial by jury under this Act: Provided that, in the case of trial under this section, any person may apply for a new trial, either to the judge before whom the trial was had, or to the Court of Appeal in Chancery (*k*).

Discretion as to summoning a jury.

(*i*) The question whether an issue ought to be tried with or without a jury is a matter entirely within the discretion of the judge, and is not a proper

subject of appeal, *Schneider* v. *Shrubsole*, 12 W. R. 359 ; but see *Fernie* v. *Young*, 1 L. R. Eng. & Ir. Ap. 63 ; though the question, when the jury is allowed, whether the trial shall be sent to a court of law or not, may be a matter of appeal, *Fernie* v. *Young*, cited p. 265, *ante*. 21 & 22 Vict. c. 27, s. 5.

The Court will generally summon a jury, especially in patent cases, *Eaden* v. *Firth*, 1 H. & M. 573 ; *Davenport* v. *Goldberg*, 2 H. & M. 285, unless both parties consent to the judges deciding without one, or the case is not of such difficulty that under the old practice no issue would have been directed. As to the cases in which issues were and are directed, see Daniell, 967, 974 ; *Taylor* v. *Brown*, 10 W. R. 361 ; *Grey* v. *Haig*, 20 Beav. 219 ; *Roberts* v. *Kerslake*, 1 K. & J. 751 ; *Egmont* v. *Darell*, 1 H. & M. 563 ; and especially as to the right of an heir at law to an issue, see *Williams* v. *Williams*, 33 Beav. 306 ; *Cowgill* v. *Rhodes*, *ibid.* 310. A jury is usually summoned, unless (*α*) the parties consent to dispense with one, or, (*β*) the case is not of sufficient difficulty for an issue under the old practice.

Therefore the Court will not direct a jury to be summoned until it has heard enough of the case to be satisfied of its necessity, *George* v. *Whitmore*, 26 Beav. 558 ; *Bonsor* v. *Bradshaw*, 4 Jur. N. S. 1011 ; *Bradley* v. *Bevington*, 4 Drew. 511.

And if the validity of the claim of one of the parties appears sufficiently established, he will not be put to the expense of a jury, *Davenport* v. *Goldberg*, 2 H. & M. 282, 285 ; *George* v. *Whitmore* (l. c.) ; *Davenport* v. *Phillips*, 5 N. R. 485.

(*k*) As to the ground on which a new trial will be directed, see *Hughes* v. *Jones*, 1 N. R. 124 ; *Penn* v. *Jack*, 15 W. R. 208 ; Daniell, 1013—1028. The time within which application for a new trial should be made is fixed by Ord. XLI. 46. New trial when directed.

If the issue has been sent to a court of law (p. 265, *ante*), the motion for a new trial must be made before the Court which directed the issue, see Ord. VI. 13, p. 398, *post* ; (*Bootle* v. *Blundell*, 19 Ves. 494) or before the Court of Appeal, and the order made on application for a new trial may be appealed from to the House of Lords when the issue was tried by the judge himself under this section, as well as when it was tried by a jury under the third section (*Curtis* v. *Platt*, 1 L. R. Eng. & Ir. App. 337). To be moved for before the Court which directed the issue. Appeal to House of Lords.

Where the application for a new trial is made to the Court of Appeal, if such Court differs with the judge who tried or directed issue, on a question of law involved therein, it will at once decide the question without sending the case down again for a new trial (*Morrison* v. *Barrow*, 1 D. F. J. 633 ; *Armstrong* v. *Armstrong*, 3 M. & K. 45 ; *Simpson* v. *Holliday*, 1 L. R. Eng. & Ir. App. 316, 321 ; *Edmunds* v. *Brougham*, 15 W. R. 84). When the Court of Appeal may decide the question instead of directing a new trial.

If no application for a new trial is made, the verdict on the issues is conclusive as to all the questions of law and fact contained in such issues, whether the verdict was found by a jury or by the judge sitting without a jury, and therefore where issues had been directed, and had been tried by the judge without a jury, and he made a decree founded on his verdict, the House of Lords refused, on an appeal from such decree, to consider any questions which were included in the issues (*Fernie* v. *Young*, 1 L. R. Eng. & Ir. App. 63). Verdict of judge or jury cannot be reconsidered on appeal, but only by way of new trial.

VI. It shall also be lawful for the Court of Chancery, in any case in which it shall think fit so to do, to cause the amount of such damages to be assessed by a jury before any judge of one of the Superior Courts of Common Law at Nisi Prius, or at the assizes, or before the sheriff of any county or city, and for that purpose to issue a precept to the sheriff of such county or city as the Court of Chancery shall think fit, or where the sheriff is interested, then to the coroner, requiring him to return, summon, and impanel a common or special jury for the Damages may be assessed by a jury before any judge of one of the Superior Courts of Common Law at Nisi Prius, or before the sheriff of any county or city.

21 & 22 Vict. c. 27, s. 6.

purpose aforesaid, in like manner as is done in cases of writs of inquiry at common law, which are to be executed before a judge or before the sheriff; and the Court of Chancery shall have power to set aside the verdict or inquisition on such inquiry, and to direct a new inquiry in such manner and on such terms as the Court shall think fit.

Where parties are competent to make admissions, any party may call on any other party to admit documents.

VII. In any case in which all parties to a suit are competent to make admissions (*l*), any party may call on any other party by notice to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, the cost of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless the Court shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except in cases where the omission to give the notice is, in the opinion of the taxing master, a saving of expense.

(*l*) See Appendix, p. xxix. *post.*

Assignees in bankruptcy and a married woman whose husband was a co-defendant were held to be competent under the section (*Churchill* v. *Coller*, 1 N. R. 82).

[By sects. 8 & 9 the previous sections of the Act are to extend to the Court of Chancery in Ireland; and the Lord Chancellor of Ireland, with the assistance of the Master of the Rolls and the Lord Justice of Appeal in Ireland, or either of them, may make rules for procedure, and for regulating fees.]

Sections 1, 2, 3, 4, 5, 6, and 7 of this Act to extend to Court of Chancery of County Palatine of Lancaster.

X. Sections I., II., III., IV., V., VI., and VII. of this Act shall extend to, and all the powers therein contained may be exercised by, the Court of Chancery of the County Palatine of Lancaster within the jurisdiction of the said Court; and the Chancellor of the Duchy and County Palatine of Lancaster, with the advice and assistance of the Lords Justices of the Court of Appeal in the High Court of Chancery, or one of them, and of the Vice-Chancellor of the County Palatine, may and they are hereby required, from time to time, to make such general rules and orders as may be necessary for assimilating the procedure and practice of the Palatine Court, in respect of the matters aforesaid, to those of the High Court of Chancery, and for regulating the fees and allowances in respect thereof.

21 & 22 Vict. c. 27, s. 11.

Lord Chancellor, &c., may make rules for procedure and for regulating fees.

XI. The Lord Chancellor, with the advice and assistance of the Master of the Rolls, the Lords Justices of the Court of Appeal in Chancery, and the Vice-Chancellors, or any three of them, may, and they are hereby required, from time to time, to make general rules and orders for carrying the purposes of this Act into effect, and for regulating the times and form and mode of procedure, and generally the practice of the said Court, in respect of the matters to which this Act relates, and for regulating the fees and allowances to all officers of the said Court and solicitors thereof in respect to such matters, and so far as may be found expedient for altering the course of proceeding hereinbefore prescribed in respect to the matters to which this Act relates, or any of them, and such rules and orders may from time to time be rescinded or altered by the like authority, and all such rules and orders shall take effect as General Orders of the said Court (*m*).

(*m*) See Ord. XLI. 26—52, *post*, referring to the schedules printed in the Appendix, pp. xxvi.—xxxii. *post*.

Rules and orders to be laid before Parliament.

XII. All General Rules and Orders made in pursuance of the powers contained in this Act shall, immediately after the making and issuing thereof, be laid before both Houses of Parliament, if Parliament be then sitting, or if Parliament be not then sitting, within five days after the next meeting thereof: Provided always, that if either of the Houses of Parliament shall, by any resolution passed within thirty-six days after such Rules or Orders have been laid before such Houses of Parliament, resolve that the whole, or any part of such Rules or Orders, ought not to continue in force, in such case the whole, or such part thereof as shall be so included in such resolution, shall from and after such resolution cease to be binding.

CHANCERY REGULATION ACT, 1862.

25 & 26 VICT. CAP. 42.

An Act to regulate the Procedure in the High Court of Chancery and the Court of Chancery of the County Palatine of Lancaster. [17*th July*, 1862.

25 & 26 Vict. c. 42.

WHEREAS the High Court of Chancery has power in certain cases to refuse or postpone the application of remedies within its jurisdiction, until questions of law and fact on which the title to such remedies depends have been (*a*) determined or ascertained in one of Her Majesty's courts of common law: And whereas it is expedient that the said power should no longer exist, and that in all such cases every question of law and of fact, cognizable in a court of common law, arising in the said Court of Chancery, on which the right of any party to any equitable relief or remedy depends, and whether the title to such relief or remedy be or be not incident to or dependent upon a legal right, should be determined by or before the said Court itself: And whereas the procedure of the Court of Chancery of the County Palatine of Lancaster has been assimilated to the procedure of the said High Court in the matters aforesaid; and it is expedient that the future procedure of the said Courts should also be alike: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

(*a*) See, for the practice before this Act, note (*d*), p. 264, *ante*.

Court *shall* determine every question of law and fact incident to the relief sought.

I. In all cases in which any relief or remedy within the jurisdiction of the said Courts of Chancery respectively is or shall be sought in any cause or matter instituted or pending in either of the said Courts, and whether the title to such relief or remedy be or be not incident to or dependent upon a legal right, every question of law or

fact, cognizable in a court of common law, on the determination of which the title to such relief or remedy depends, shall be determined by or before the same Court (*b*). 25 & 26 Vict. c. 42, s. 1.

(*b*) As to the effect of this sect. on the Court's jurisdiction as to damages, see note (*b*), p. 261, *ante*. As to its effect on the Court's jurisdiction to try issues of law or fact before itself with or without a jury, see note (*d*), p. 264, *ante*.

II. Provided always, that whenever it shall appear to either of such Courts that any question of fact may be more conveniently tried by a jury at the Assizes, or at any sitting in London or Middlesex for the trial of issues in the superior courts of common law, it shall be lawful for such Court, notwithstanding anything in this Act contained, to direct an issue to try any question of fact at the Assizes to be held in and for any county where the same may be conveniently tried, or at any such sitting for the trial of issues in London or Middlesex as aforesaid; and (subject to such general orders, if any, as may hereafter be made in relation thereto,) the practice hitherto existing in such Court in reference to the trial of issues shall prevail in reference to the trial of any issues directed under this proviso (*c*). Where questions of fact may be more conveniently tried at assizes, issues may be directed.

(*c*) For cases where this proviso applies, see note (*d*), p. 264, *ante*.

III. All the provisions with reference to the trial of questions of fact by or before the High Court of Chancery, and by or before the Court of Chancery of the said County Palatine, which are contained in "The Chancery Amendment Act, 1858," shall apply to the determination of questions of fact by or before the said Courts respectively under this Act. Provisions of 21 & 22 Vict. c. 27, to apply to this Act.

IV. Provided also, that in all cases in which the object of any suit in equity shall be to recover or to defend the possession of land under a legal title, or under a title which would have been legal but for the existence of some outstanding term, lease, or mortgage (and whether mesne profits or damages shall or shall not also be sought in such suit), such relief only shall be given in equity as would have been proper according to the rules and prac- Proviso in cases where object of suit to recover or defend possession of land under a legal title.

25 & 26 Vict. c. 42, s. 4.

tice of the Court if this Act had not passed; and nothing in this Act shall make it necessary for a Court of Equity to grant relief in any suit concerning any matter as to which a court of common law has concurrent jurisdiction, if it shall appear to the Court that such matter has been improperly brought into equity, and that the same ought to have been left to the sole determination of a court of common law (*d*).

(*d*) For cases where this proviso applies, see note (*b*), p. 261; and note (*d*), p. 264, *ante*.

Court of Chancery may sit with assistance of a common law judge.

V. Nothing in this Act contained shall alter or affect the power of the judges of the High Court of Chancery to sit with the assistance of a judge of any of Her Majesty's courts of common law.

Commencement of Act.

VI. This Act shall commence and take effect from and after the first day of November one thousand eight hundred and sixty-two, and may be cited or referred to as

Short title.

"The Chancery Regulation Act, 1862."

PROPERTY AND TRUSTEES RELIEF AMENDMENT ACT (*a*).

22 & 23 VICT. CAP. 35.

An Act to further Amend the Law of Property, and to relieve Trustees. [13*th Aug.* 1859.

22 & 23 Vict. c. 35.

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

(*a*) V.-C. Wood considered this Act to be throughout retrospective (*Bennett* v. *Lytton*, 2 J. & H. 155—158).

Retrospective.

[Sects. 1—10, 12, 19—22, and 24, of this Act relate merely to property law, but as they will be constantly referred to by the Chancery Practitioner, it has been thought advisable not to omit them. All the sections which in any degree bear on the subjects within the scope of this work are printed in large type.

Leases.

Effect of licence for breach of covenant.

Sect. 1 relates to *provisoes for re-entry on breach of covenants in a lease*, and in consequence of the old doctrine, that if an express licence was once given by the landlord for a breach of the covenant, the right of re-entry was

gone for ever, enacts that "where any licence to do any act which without "such licence would create a forfeiture, or give a right to re-enter, under a con- "dition or power reserved in any lease heretofore granted, or to be hereafter "granted, shall at any time after the passing of this Act be given to any lessee "or his assigns, every such licence shall, unless otherwise expressed, *extend only* "to the permission actually given, or to any specific breach of any proviso or "covenant made or to be made, or to the actual assignment, under lease, or "other matter thereby specifically authorised to be done, but not so as to prevent "any proceeding for any subsequent breach (unless otherwise specified in such "licence), and all rights under covenants and powers of forfeiture and re-entry in "the lease contained shall remain in full force and virtue, and shall be available "as against any subsequent breach or covenant or condition, assignment, under "lease, or other matter not specifically authorised or made dispunishable by such "licence, in the same manner as if no such licence had been given; and the con- "dition or right of re-entry shall be and remain in all respects as if such licence had "not been given, except in respect of the particular matter authorised to be done." 22 & 23 Vict. c. 35, s. 1. Lessor giving license for,

The subsequent Act, 23 & 24 Vict. c. 38, s. 6, p. 289, *post*, further provides that "any actual waiver shall not be assumed or deemed to extend to any "instance or any breach of covenant or condition other than that to which such "waiver shall specially relate." or waiving *one breach* of covenant,

Sect. 2 relates to the same subject, and provides that "where re-entry on "assigning or underletting or doing any other specified act without licence, and "a licence at any time after the passing of this Act shall be given to one of "several lessees or co-owners to assign or underlet his share or interest, or to do "any other act prohibited to be done without licence, or shall be given to any "lessee or owner, or any one of several lessees or owners, to assign or underlet "part only of the property, or to do any other such act as aforesaid in respect of "part only of such property, such licence shall not operate to destroy or "extinguish the right of re-entry in case of any breach of the covenant or condi- "tion by the co-lessee or co-lessees, or owner or owners, of the other shares or "interests in the property, or by the lessee or owner of the rest of the property "(as the case may be) over or in respect of such shares or interests or remaining "property, but such right of re-entry shall remain in full force over or in respect "of the shares or interest of property not the subject of such licence." or in the case of *one of several lessees*, not to lose benefit of covenants.

By sect. 3, "Where the reversion upon a lease is severed, and the rent or "reservation is legally apportioned, the assignee of each part of the reversion "shall, in respect of the apportioned rent or other reservation allotted or "belonging to him, have and be entitled to the benefit of all conditions or "powers of re-entry for non-payment of the original rent or other reservation, "in like manner as if such conditions or powers had been reserved to him as "incident to his part of the reversion in respect of the apportioned rent or "other reservation allotted or belonging to him." See sect. 10, next page. Apportionment of rent not to destroy right of re-entry.

Policies of Insurance.

Sect. 4 relates to *forfeitures of leases* for breach of covenants to insure, and as the Court of Chancery, though accustomed to relieve against penalties and forfeitures, refused to do so in cases of *omission to insure* (see note to *Peachy* v. *Duke of Somerset* in White and Tudor's Leading Cases, vol. ii.) the section (provides that "a Court of Equity shall have power (but see sect. 6, *infra*) "to relieve against a forfeiture for breach of a covenant or condition to insure "against loss or damage by fire, where no loss or damage by fire has happened, "and the breach has, in the opinion of the Court, been committed through "accident or mistake, or otherwise without fraud or gross negligence, and there "is an insurance on foot at the time of the application to the Court in conformity "with the covenant to insure, upon such terms as to the Court may seem fit." The section has been held to apply to a breach committed since the passing of the Act, though the lease in which the covenant was contained was executed before that time (*Page* v. *Bennett*, 2 Giff. 117). Lessees relieved from forfeiture in case of omission to insure.

By sect. 5 "the Court, where relief shall be granted, shall direct a record of "such relief having been granted to be made by indorsement on the lease or "otherwise."

T

22 & 23 Vict. c. 35, s. 6.

[And by sect. 6 "the Court shall not have power under this Act to relieve "the same person more than once in respect of the same covenant or condition; "nor shall it have the power to grant any relief under this Act where a for- "feiture under the covenant in respect of which relief is sought shall have been "already waived out of court in favour of the person seeking the relief."

Lessees,

Sect. 7 provides, as some compensation, that the lessor shall have the benefit of an informal insurance, as follows: "The person entitled to the benefit of a "covenant on the part of a lessee or mortgagor to insure against loss or damage "by fire, shall, on loss or damage by fire happening, have the same advantage "from any then subsisting insurance relating to the building covenanted to be "insured, effected by the lessee or mortgagor in respect of his interest under the "lease or in the property, or by any person claiming under him, but not effected "in conformity with the covenant, as he would have from an insurance effected "in conformity with the covenant."

and purchasers from lessees relieved from forfeiture in case of omission to insure.

Sect. 8, in order to protect purchasers of leaseholds against the consequence of omissions to insure on the part of those from whom they purchase, provides that "where, on the *bonâ fide* purchase after the passing of this Act of a "leasehold interest under a lease containing a covenant on the part of the lessee "to insure against loss or damage by fire, the purchaser is furnished with the "written receipt of the person entitled to receive the rent, or his agent, for the "last payment of rent accrued due before the completion of the purchase, and "there is subsisting at the time of the completion of the purchase an insurance "in conformity with the covenant, the purchaser or any person claiming under "him shall not be subject to any liability, by way of forfeiture or damages or "otherwise, in respect of any *breach of the covenant committed at any time* "*before* the completion of the purchase, *of which the purchaser had not notice* "before the completion of the purchase; but this provision is not to take away "any remedy which the lessor or his legal representatives may have against the "lessee or his legal representatives for breach of covenant.

And by sect. 9 "the preceding provisions shall be applicable to leases for a "term of years absolute, or determinable on a life or lives or otherwise, and also "to a lease for the life of the lessee or the life or lives of any other person or "persons."

Apportionment of rentcharge not to extinguish rentcharge.

The 10th sect. relates to *rentcharges*, which were discouraged by the common law as contrary to feudal policy, and hence arose the doctrine that a person having a rentcharge by releasing all his right in part of the land charged extinguished the whole rent because it issued out of every part and could not be apportioned, see Shelford's R. P. statutes, 686. To meet this inconvenience it is provided: "The release from a rentcharge of part of the "hereditaments charged therewith shall not extinguish the whole rentcharge, "but shall operate only to bar the right to recover any part of the rentcharge "out of the hereditaments released, without prejudice nevertheless to the rights "of all persons interested in the hereditaments remaining unreleased, and "not concurring in or confirming the release."]

Judgments.

Release of part of land charged not to affect judgment.

XI. The release from a judgment of part of any hereditaments charged therewith shall not affect the validity of the judgment as to the hereditaments remaining unreleased, or as to any other property not specifically released, without prejudice nevertheless to the rights of all persons interested in the hereditaments or property remaining unreleased, and not concurring in or confirming the release (*b*).

(*b*) See sect. 10 *supra*, and see generally as to judgments, note (*a*), p. 3, *ante*.

[Sects. 12 & 13 relate to appointments under powers; and as, by common law, if the *formalities* required by the instrument creating the power were not *strictly* complied with, the appointment was void, while Courts of Equity went to the other extreme, and aided defective execution of powers, in favour of purchasers, &c., even where the defect was in matter of substance, *e. g.*, the want of a *consent* required by an instrument, this section provides that "a *deed* "hereafter executed in the presence of and attested by two or more witnesses in "the manner in which deeds are ordinarily executed and attested shall, *so far* "*as respects the execution and attestation* thereof, be a *valid execution of a* "*power of appointment by deed, or by any instrument in writing not testa-* "*mentary*, notwithstanding it shall have been expressly required that a deed or "instrument in writing made in exercise of such power should be executed or "attested with some additional or other form of execution or attestation or "solemnity: Provided always, that this provision shall *not operate to defeat any* "*direction* in the instrument creating the power that the *consent* of any parti- "cular person shall be necessary to a valid execution, or that any *act shall be* "*performed* in order to give validity to any appointment having no relation to "the mode of executing and attesting the instrument, and nothing herein con- "tained shall prevent the donee of a power from executing it conformably to the "power by writing or otherwise than by an instrument executed and attested as "an ordinary deed, and to any such execution of a power this provision shall "not extend." See note to *Tollett* v. *Tollett* in 1 White and Tudor's Leading Cases.

22 & 23 Vict. c. 35, ss. 12, 13.

Mode of executing powers of appointment by deed;

By 1 Vict. c. 26, s. 10, an appointment by will is to be executed like other wills, to be valid, though solemnities are not observed.]

by will.

XIII. Where under a power of sale a *bonâ fide* sale shall be made of an estate with the timber thereon, or any other articles attached thereto, and the tenant for life or any other party to the transaction shall by mistake be allowed to receive for his own benefit a portion of the purchase-money as the value of the timber or other articles (*c*), it shall be lawful for the Court of Chancery, upon any bill *or claim or application in a summary way as the case may require or permit* (*d*), to declare that upon payment by the purchaser, or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the Court shall direct, and the settlement of the said principal monies and interest under the direction of the Court upon such parties as in the opinion of the Court shall be entitled thereto, the said sale ought to be established; and upon such payment and settlement being made accordingly the Court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the said application as between solicitor and client shall be paid by the purchaser or the claimant under him.

Sale under power not to be avoided by reason of mistaken payment to tenant for life.

22 & 23 Vict. c. 35, s. 13.

(*c*) This section meets the particular case of *Cockerell* v. *Cholmeley*, 1 R. & M. 418, where an estate was devised to a trustee and his heirs, to the use of A. for life, without impeachment over, and the trustee under a power of sale, with A.'s consent, sold the estate *apart from the timber*, which was taken at a valuation, and the power was held to be both at law and in equity badly executed.

(*d*) Compare the provisions of the Act authorising sales of land apart from the minerals (*ante*, p. 259).

Powers [of Trustees.]

Devisee in trust may raise money by sale, notwithstanding want of express power in the will.

XIV. Where by any will which shall come into operation after the passing of this Act the testator shall have *charged his real estate* or any specific portion thereof *with the payments of his debts*, or with the payment of any legacy or other specific sum of money, and shall have *devised the estate so charged to any trustee or trustees* for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such estate (*e*), it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to *raise such debts*, legacy, or money as aforesaid *by a sale* and absolute disposition by public auction or private contract of the said hereditaments or any part thereof, *or by a mortgage* of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed may reserve such rate of interest and fix such period or periods of repayment as the person or persons executing the same shall think proper.

Effect of charge of debts.

(*e*) Under the old law, in cases where a testator, instead of devising property to trustees with an express power of sale, created a charge of debts only, it was doubtful whether the devisees in trust could give valid receipts to a purchaser. See notes to *Elliott* v. *Merriman* in White and Tudor's Leading Cases, vol. i., and Lewin, p. 340, *et seq.*; but with regard to *wills coming into operation after 13th August*, 1859, this point is now set at rest by this and the following sections.

Powers given by last section extended to survivors, devisees, &c.

XV. The powers conferred by the last section shall extend to all and every person or persons in whom the estate devised shall for the time being be vested by survivorship, descent, or devise, or to any person or persons who may be appointed under any power in the will, or by the Court of Chancery, to succeed to the

trusteeship vested in such devisee or devisees in trust as aforesaid (*f*). 22 & 23 Vict. c. 35, s. 15.

(*f*) See note (*r*), p. 101, *ante*.

Executors to have power of raising money &c., where there is no sufficient devise.

XVI. If any testator who shall have created such a charge as is described in the fourteenth section shall not have devised the hereditaments charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the *executor or executors* (*g*) for the time being named in such will (if any) shall have the same or the like power of raising the said monies as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested; but any sale or mortgage under this Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate.

(*g*) This power is not given to the *administrators*, see Lewin, 347.

Purchasers, &c. not bound to inquire as to powers.

XVII. Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by sections fourteen, fifteen, and sixteen of this Act, or either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof.

Sections 14, 15, and 16 not to affect certain sales, &c., nor to extend to devisees in fee or in tail.

XVIII. The provisions contained in sections fourteen, fifteen, and sixteen shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made, under or in pursuance of any will coming into operation before the passing of this Act, but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this Act had not passed (*h*); and the said several sections shall not extend to a *devise* to any person or persons in fee or in tail (*i*), or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do.

22 & 23 Vict. c. 35, s. 18.

(*h*) See Lewin, 340.

(*i*) These words are *declaratory* of the former state of the law, see Lewin, 343, 344.

[Sections 19 & 20 supply a deficiency in the law of inheritance, 3 & 4 Will. 4, c. 106, and will be found in Shelford's R. P. Statutes, 455; Sugden's R. P. Statutes, 259.

Assignment to self and others.

Section 21 relates to the assignment of personalty, and provides that "any "person shall have power to assign personal property, now by law assignable, "including chattels real, *directly to himself and another person* or other per- "sons or corporation, by the like means as he might assign the same to another."

Registration of judgments

Section 22 enacts that after December 31, 1859, the provision as to registry of judgments contained in 2 & 3 Vict. c. 11, and 18 & 19 Vict. c. 15 (see Shelford's R. P. Statutes, 590—3), shall apply to Crown debts. The provisions of judgment Acts as to registration (except registration of execution), are less important, now that judgments are not to affect lands until they are taken in execution, see note (*a*), p. 6, *ante*, and the Judgment Act, 1864, p. 355, *post*].

[*Trustees' Receipts.*]

Not to be bound to see to the application of purchase-money.

XXIII. The *bonâ fide* payment to and the receipt of any person to whom any purchase or mortgage money shall be payable upon any express or implied trust shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, *unless the contrary shall be expressly declared by the instrument* creating the trust or security (*k*).

Trustees' receipts.

(*k*) This section seems only to apply to instruments executed since 13th August, 1859; see Lewin, 240. Lord Cranworth's Act, ss. 29, 34, *post*, pp. 304, 306, contains a more general power for trustees to give sufficient discharges, but only applies to instruments executed since August 28, 1860.

Concealment of incumbrances a misdemeanor.

[Section 24 provides that any vendor or mortgagor concealing any settlement deed, will, or other instrument material to the title, or any incumbrance, from the purchaser [*or mortgagee*], shall be guilty of a misdemeanor, and punishable accordingly.

The insertion of the words [or mortgagee], which were accidentally omitted, was provided for by 23 & 24 Vict. c. 38, s. 8, *post*, p. 289.]

Interpretation of terms.

XXV. In the construction of the previous provisions in this Act the term "land" shall be taken to include all tenements and hereditaments, and any part or share of or estate or interest in any tenements or hereditaments, of what tenure or kind soever; and

The term "mortgage" shall be taken to include every instrument by virtue whereof land is in any manner conveyed, assigned, pledged, or charged as security for the repayment of money or money's worth lent, and to be re-

conveyed, re-assigned, or released on satisfaction of the debt; and 22 & 23 Vict. c. 35, s. 25.

The term "mortgagor" shall be taken to include every person by whom any such conveyance, assignment, pledge, or charge as aforesaid shall be made; and

The term "mortgagee" shall be taken to include every person to whom or in whose favour any such conveyance, assignment, pledge, or charge as aforesaid is made or transferred (*l*):

The term "judgment" shall be taken to include registered decrees, orders of Courts of Equity and Bankruptcy, and other orders having the operation of judgments (*l*).

(*l*) See 27 & 28 Vict. c. 112, s. 2, *post*, for the interpretation of similar terms in that Act.

Trustees and Executors.

XXVI. No trustee, executor, or administrator making any payment or doing any act *bonâ fide* under or in pursuance of any power of attorney shall be liable for the monies so paid or the act so done, by reason that the person who gave the power of attorney was dead at the time of such payment or act, or had done some act to avoid the power, provided that the fact of the death, or of the doing of such act as last aforesaid, at the time of such payment or act *bonâ fide* done as aforesaid by such trustee, executor, or administrator, was not known to him: Provided always, that nothing herein contained shall in any manner affect or prejudice the right of any person entitled to the money against the person to whom such payment shall have been made, but that such person so entitled shall have the same remedy against such person to whom such payment shall be made as he would have had against the trustee, executor, or administrator if the money had not been paid away under such power of attorney (*m*). Trustee, &c., making payment under power of attorney not to be liable by reason of death of party giving such power.

(*m*) See Lewin, 285.

This and the remaining sections of the Act provide for the protection of trustees, executors, and administrators, acting *bonâ fide* in the distribution of trust funds. See note (*t*), p. 126, *ante*. Protection of trustees acting bonâ fide.

22 & 23 Vict. c. 35, s. 27.

As to liability of executor or administrator in respect of rents, covenants, or agreements.

XXVII. Where an executor or administrator, liable as such to the rents, covenants, or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed or ascertained sum covenanted or agreed by the lessee to be laid out on the property demised or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof (*n*), he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed.

Section retrospective.

(*n*) This section has been held to be retrospective, *Smith* v. *Smith*, 1 Dr. & Sm. 384; *Re Green*, 2 D. F. J. 121; reversing *Dodson* v. *Sammell*, 8 W. R. 252, on this point; and see *Reilly* v. *Reilly*, 34 Beav. 406; *Bennett* v. *Lytton*, 2 J. & H. 155, 158.

Executor must assign the leasehold.

The case of a leasehold assigned to a residuary legatee is not within this section, such legatee not being a purchaser (*Dodson* v. *Sammell*, 9 W. R. 887).

Indemnity of executor under lease.

Executors acting *bonâ fide*, under the order of the Court of Chancery, are protected from liability, and have no need to retain any portion of the assets to indemnify them against possible liability in respect of the testator's covenants, *Dean* v. *Allen*, 20 Beav. 1; *England* v. *Lord Tredegar*, 1 L. R. Eq. 344; Williams on Executors, 1244—8.

As to setting apart a fund in an administration suit to meet claims in re-

spect of leasehold assigned, and payment out of such fund to residuary legatees, with the consent of the lessor, see *Bunting* v. *Marriott*, 9 W. R. 264; Seton, 196. 22 & 23 Vict. c. 35, s. 27.

As to liability of executor, &c., in respect of rents, &c., in conveyances on rentcharge.

XXVIII. In like manner, where an executor or administrator liable as such to the rents, covenants, or agreements, contained in any conveyance or chief rent or rentcharge (whether any such rent be by limitation of use, grant, or reservation), or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said conveyance, or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the said conveyance or agreement for a conveyance; and the executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance, or agreement for conveyance; but nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed.

As to distribution of the assets of testator or intestate

XXIX. Where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought

22 & 23 Vict. c. 35, s. 29.

after notice given by executor or administrator.

to be charged would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices or the last of the said notices for sending in such claims (*o*), be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively.

Indemnity of executors issuing notices to creditors.

(*o*) As to this notice, see Ord. XXXV. 35—37, *post*; and see as to the remedies of executors in equity, note (*t*), p. 126, *ante*. Executors acting under the provisions of this section, whether they have actually paid legacies over, or only appropriated them, have complete protection against future claims, *Clegg* v. *Rowland*, 3 L. R. Eq. 368.

Trustee, executor, &c., may apply by petition to judge of Chancery for opinion, advice, &c., in management, &c. of trust property.

XXX. Any trustee, executor, or administrator shall be at liberty, without the institution of a suit, to apply by petition to any judge of the High Court of Chancery, or by summons (*p*) upon a written statement to any such judge at chambers, for the opinion, advice, or direction of such judge on any question (*q*) respecting the management or administration of the trust property or the assets of any testator or intestate, such application to be served upon or the hearing thereof to be attended by all persons interested in such application, or such of them as the said judge shall think expedient; and the trustee, executor, or administrator acting upon the opinion, advice, or direction given by the said judge shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator in the subject matter of the said application: Provided nevertheless,

that this Act shall not extend to indemnify any trustee, executor, or administrator in respect of any act done in accordance with such opinion, advice, or direction as aforesaid, if such trustee, executor, or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction and the costs (*r*) of such application as aforesaid shall be in the discretion of the judge to whom the said application shall be made. 22 & 23 Vict. c. 35, s. 30.

(*p*) The application under this section should be by *petition*, not summons (*Re Dennis*, 5 Jur. N. S. 1388. For a form of petition, see *Re Miles*, 27 Beav. 579; *Re Pitt's Will*, 27 Beav. 576. It must be signed by counsel, 23 & 24 Vict. c. 38, s. 9, p. 289, *post*. But the Court made an order under the section on the petition of a *cestui que trust*, *Re Ward*, 14 W. R. 96; and of one trustee without his co-trustee's concurrence, *Re Muggeridge*, Johns. 625. Application how made.

See as to the form, and title, and service of petitions under this section, Ord. 20th March, 1860, *post*. It was originally held that the direction of the judge as to the persons to be served should be obtained in the first instance, *Re Muggeridge*, l. c., and see note (*c*), p. 244, *ante*, and *Re Simson*, 1 J. & H. 89, and sect. 42 of the Transfer of Land Act, p. 323, *post*. But this practice has since been disapproved of, *Re Green*, 8 W. R. 403. It is not, it seems, necessary to serve all persons interested (*Re Muggeridge*, l. c.), unless there is a deficiency of assets (*Re Mockett*, Johns. 628). Service.

(*q*) "As the Act does not give any right of appeal, it was not intended to decide nice questions of law, its object being to procure for trustees at a small expense the assistance of the Court upon points of minor importance arising in the management of the trust," Lewin, 443; *Re Muggeridge*, (l. c.); *Re Mockett* (l. c.). In *Re* ——, 8 W. R. 333; s. c. *sub nom. Re Spiller*, 2 L. T. N. S. 71, a petition was presented to the Lords Justices under this section by the trustees of certain marriage settlements, which settled the income of trust funds on the wife for her separate use, asking what they were to do with the income of the fund, the wife having become a lunatic, and being supported by her husband in a private lunatic asylum. The following order was made:—"The Court, declaring their opinion that the whole of the income of the trust funds should henceforth be paid to the husband until the further order of the Court, he undertaking to apply the same for the maintenance and support of his wife, and for the support of the children of the marriage, order the same accordingly; the costs of and incidental to this application to be defrayed out of the income of the trust property." See further, for form of order, *Re Jacob*, 9 W. R. 474. So the Court will give advice as to investments, *Re Lorenz*, 1 Dr. & Sm. 401; or payment of debts, *Re Box*, 1 H. & M. 552. What questions entertained on petition. Questions of management.

But where trustees were authorised by the settlement to lay out trust funds in purchasing real estate, which was accordingly purchased, and a petition was presented to obtain a direction of the Court as to the employment of a further portion of the trust funds in the permanent improvement of the purchased estates, the Court having no means of ascertaining the amount required or directing its application, refused to make an order on petition (*Re Barrington*, 1 J. & H. 142; comp. *Re Mockett* (l. c.). In another case (*Re Simson*, 1 J. & H. 89; where the question was whether a trustee would be justified in investing in East India stock or in railway debentures, or on mortgage of freeholds, copyholds, or leaseholds, V.-C. Wood answered the inquiry by simply stating that the trustees would be justified in investing in freehold securities in England or Wales, and gave no answer to the rest of the question; see *Marsh* v. *Attorney-General*, 2 J. & H. 61; where the Court thought the question too difficult to decide on petition, and directed a bill to be filed, see p. 70, *ante*. Not (1) questions of detail where affidavits are required; nor (2) questions of difficulty;

22 & 23 Vict. c. 35, s. 30.

nor (3) questions of construction;

So where questions of construction arise, a suit must be instituted, or the advice of the Court taken under the Trustee Relief Act; see *Re Evans*, 30 Beav. 232, *Re Muggeridge*, l. c.; *Re Lorenz*, 1 Dr. & Sm. 401; where V.-C. Kindersley refused, on a petition under this Act, to advise a sole trustee of a marriage settlement as to his discretionary power to make advances to the husband at the written request of the wife, and *Re Hooper*, 29 Beav. 657; where the Master of the Rolls stated that the object of the Act was to enable trustees to obtain the opinion of the Court on matters of discretion vested in them, and *not to determine questions of construction*. These cases seem to overrule cases where questions as to the validity (*Re Michel*, 28 Beav. 39) or construction (*Re Green*, 8 W. R. 403; *Re Davies*, 9 W. R. 134; *Re Elmore*, 6 Jur. N. S. 1325; *Re Jacob*, 29 Beav. 402), of a bequest have been determined upon petition under the section, and *Re Pitt's Will*, 27 Beav. 576, where an opinion was given turning to a certain extent upon extrinsic evidence admitted with a view to the construction of a will. See, however, *Re Peyton's Settlement*, 10 W. R. 515, where the Master of the Rolls in a petition under this Act decided that an absolute power of sale given to trustees, authorised them on a sale to fix a reserved bidding.

nor (4) hypothetical cases.

The Court will not pronounce an opinion on an hypothetical case; and, therefore, refused to give any advice as to the incidence of future calls which might be made on account of shares bequeathed, *Re Box*, 1 H. & M. 552; 11 W. R. 945.

No appeal.

The opinion of the Court is subject to no appeal, and does not prevent a bill being filed (*Re Mockett's Will*, l. c.).

Costs.

(*r*) As a general rule the costs of an application under this section will be ordered to come out of the *corpus* of the trust property, *Re M'Veagh*, Seton, 773; *Re Elwes*, *ibid*, 774.

But where the question arose as to the application of income, the costs came out of the income, *Anon.* 8 W. R. 333.

Every trust instrument to be deemed to contain clauses for the indemnity and re-imbursement of the trustees.

XXXI. Every deed, will, or other instrument creating a trust either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following (that is to say), "That the trustees or trustee for the time being of the said deed, will, or other instrument shall be respectively chargeable only for such monies, stocks, funds, and securities as they shall respectively actually receive notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust monies or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds, or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will, or other instrument to reimburse themselves or himself, or pay or dis-

charge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will, or other instrument. 22 & 23 Vict. c. 35, s. 31.

As to investments by trustees.

XXXII. (*s*) When a trustee, executor, or administrator shall not, by some instruments creating his trust, be expressly forbidden to invest any trust fund on real securities, in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on East India Stock (*t*), it shall be lawful for such trustee, executor, or administrator to invest such trust fund on such securities or stock; and he shall not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and proper.

Retrospective.

(*s*) This section is made retrospective by Lord St. Leonards' late Act, 23 & 24 Vict. c. 38, s. 12 (p. 291), *post*; but in *Hume* v. *Richardson*, 10 W. R. 528, where a question arose as to the duty of trustees to convert East India Stock, it was held that as the later Act gave the trustees a discretion to keep the trust fund invested in perishable securities, the tenant for life was entitled to the whole income accruing after the passing of that Act, but only to so much of the prior income as would have been produced by the equivalent in consols of the investments retained, the 12th clause of the Act (rendering this section retrospective), being considered to mean, not that rights originally accrued were to be altered, but that this clause was to be thrown back on instruments, on which it did not previously operate.

Does not apply if no power in instrument.

This section does not apply to a case where the trust fund is already invested in bank annuities, and there is no power in the instrument to vary securities, *Re Warde*, 2 J. & H. 191.

23 & 24 Vict. c. 38, ss. 10, 11.

Compare 23 & 24 Vict. c. 38, s. 11, p. 291, *post*, which empowers trustees to invest trust funds in the stocks, &c., in which cash under the control of the Court may be vested; as to which see notes (*j*) and (*k*) on p. 290.

30 & 31 Vict. c. 132.

Trustees may invest in any securities guaranteed by parliament.

By sect. 2 of the late Act, 30 & 31 Vict. c. 132 (20th Aug. 1867), it is enacted that "it shall be lawful for every trustee, executor, or administrator to invest any trust fund in his possession, or under his control, in any securities the interest of which is or shall be guaranteed by parliament to the same extent and in the same manner (*i. e.*, when not forbidden, &c., see the section in the text,) as he may invest such trust fund in such securities as aforesaid."

Application of term "East India Stock."

(*t*) The late Act, 30 & 31 Vict. c. 132 (20th Aug. 1867), after reciting the section in the text, and that doubts had arisen as to the legal effect and significance of the words East India stock, (as to which see Lewin, 252), enacts the words 'East India Stock' in the said Act (22 & 23 Vict. c. 35) shall include and express as well the East India Stock which existed previously to the 13th August, 1859, when the said Act received the assent of her Majesty, as East India Stock charged on the revenues of India, and created under and by virtue of any Act or Acts of Parliament which received her Majesty's assent on or after the 13th August, 1859; and it shall be lawful for every trustee, executor, or administrator to invest any trust fund in his possession or under his control in the stock created by the last-mentioned Act or Acts to the same extent, and for the same purposes and objects, as he can now invest such trust fund in the East India Stock which existed previously to the 13th August, 1859."

LAW OF PROPERTY FURTHER AMENDMENT ACT.

23 & 24 VICT. CAP. 38.

An Act to further amend the Law of Property.

[23*rd July*, 1860.

23 & 24 Vict. c. 38.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Writs of execution of judgments to be registered.

I. Whereas it is desirable to place freehold, copyhold, and customary estates on the same footing with leasehold estates (*a*), in respect of *judgments*, statutes, and recognizances *as against purchasers and mortgagees*, and also to enable purchasers and mortgagees of estates, whether freehold, copyhold, or customary or leasehold, to ascertain when execution has issued on any judgment, statute, or recognizance, and to protect them against delay in the execution of the writ: Be it therefore enacted, that no judgment, statute, or recognizance to be entered up after the passing of this Act (*b*) shall affect any land (of whatever tenure) as to a *bonâ fide* purchaser for valuable consideration, or a mortgagee (*c*) (whether such purchaser or mortgagee have notice or not of any such judgment, statute, or recognizance), unless *a writ or other due process of execution* of such judgment, statute, or recognizance shall have been *issued and registered* as hereinafter is mentioned before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him: Provided always, that no judgment, statute, or recognizance to be entered up after the passing of this Act, nor any writ of execution or other process thereon, shall affect any land of whatever tenure as to a *bonâ fide* purchaser or mortgagee, although execution or other process shall have issued thereon, and have been duly registered, unless such execution or other process shall be *executed and put in force within three calendar months* from the time when it was registered.

(*a*) The latest Judgment Act (27 & 28 Vict. c. 112, *post*) assimilates lands subject to judgments entered up since 29 July, 1864, to purely personal estate, see note (*a*) to p. 3, *ante*; and no purchaser, &c. is bound unless the land is actually *taken in execution*. The provisions of this section are therefore superseded, except such as relate to the registration of execution, and they are amended by the late Act, see note to next section.

(*b*) Judgments registered before the date of this Act (23 July, 1860) affect lands according to the old law, though no writ of execution has been issued, see *Evans* v. *Williams*, 2 Dr. & Sm. 324.

(*c*) The provisions of the latest Act are general, but as to judgments registered before July 29, 1864, the debtor himself and volunteers claiming under him are bound by judgments according to the old law, see last note.

23 & 24 Vict. c. 38, s. 1.

Judgments since July, 1864, must be put in execution.

Before July, 1861, old law applies.

Effect of notice.

Mode of registering.

II. The registry hereinbefore required of any writ of execution, or other due process on any judgment, statute, or recognizance, in order to bind a purchaser or mortgagee, shall be made by a memorandum or minute referring to the judgment, statute, or recognizance already registered, so as to connect the registry of the writ of execution or other process therewith; such memorandum or minute to be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the particulars in a book in alphabetical order by the name of the person in whose behalf the judgment, statute, or recognizance upon which the writ of execution or other process issued was registered (*d*), and also the year and the day of the month when every such memorandum or minute is left with him, and such officer shall be entitled for any such registry to the sum of five shillings; and all persons shall be at liberty to search the same book, in addition to all the other books in the same office, on payment of the sum of one shilling only: And all the provisions in this Act in regard to writs of execution or other process and the registry thereof, or otherwise relating thereto, shall extend, *mutatis mutandis*, to writs of execution, or other due process issuing on judgments of the several Courts of Common Pleas of the County Palatine of Lancaster, and of Pleas of the County Palatine of Durham: but none of these provisions are to extend to Ireland.

(*d*) The registry of the writ of execution is now to be made in the name of the debtor by 27 & 28 Vict. c. 112, s. 3, *post*, p. 338.

Double search necessary.

Provision for protection of heirs and exe-

III. And whereas by an Act passed in the fourth and fifth years of their late Majesties King William and

23 & 24 Vict. c. 38, s. 3.

cutors against unregistered judgments.

Queen Mary, intituled, "An Act for the better Discovery of Judgments in the Courts of King's Bench, Common Pleas, and the Exchequer in Westminster," it was enacted, that no judgment not docketed and entered in books in the manner thereby provided should affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators in their administration of their ancestors', testators', or intestates' estates: And whereas by several later Acts judgments are required to be registered with more particulars than were required by the said recited Act; and it is thereby enacted that judgments not so registered shall not affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors unless and until the same shall be registered in manner thereby required; and in obedience to a direction in one of the same Acts contained the dockets existing under the said first-recited Act have been finally closed: And whereas the said several later Acts do not expressly enact that judgments not docketed as thereby required shall not have any preference against heirs, executors, or administrators in their administration of their ancestors', testators,' or intestates' estates, in consequence whereof such heirs, executors, or administrators have been held to have lost the protection which they enjoyed under the said first-recited Act, and it is expedient that the same should be restored: Be it therefore declared and enacted, that *no judgment which has not already been, or which shall not hereafter be entered or docketed* under the several Acts now in force, and which passed subsequently to the said Act of the fourth and fifth years of King William and Queen Mary, so as to bind lands, tenements, or hereditaments as against purchasers, mortgagees, or creditors, *shall have any preference* against heirs, executors, or administrators *in* their *administration of* their ancestors', testators', or intestates' estates (*e*).

Effect of notice.

(*e*) See *Fuller* v. *Redman*, 26 Beav. 600; Williams on Executors, 937. If executors have notice of judgments, such judgments obtain priority, whether registered or not (*Jennings* v. *Rigby*, 33 Beav. 198).

[Sect. 4 provided that judgments, in order to have preference in administration, must be re-registered every five years according to the Acts of 1 & 2 Vict., 2 & 3 Vict., and 18 & 19 Vict. 23 & 24 Vict. c. 38, s. 4.

Sect. 5 defined judgments as they are now defined by the latest judgment Act, 27 & 28 Vict. c. 112, s. 2, p. 356, *post*.

Sect. 6 amended the law of waiver as between lessor and lessee, see p. 273, *ante*.

Sect. 7 relates to the law of uses, and the doctrine of scintilla juris, as to which, see Sandars on Uses, pp. 112, 152. This doctrine caused inconvenience, because the disturbance of the feoffees to uses might be held to bar future uses, and this section, therefore, provides that "where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise *by force of and by relation to the estate and seisin originally vested in the person seised to the uses*, and the continued existence in him or elsewhere of any seisin to uses or scintilla juris shall not be deemed necessary for the support of or to give effect to future or contingent or executory uses, nor shall any such seisin to uses or scintilla juris be deemed to be suspended, or to remain or to subsist in him or elsewhere." Doctrine of uses.

Sect. 8 corrected a clerical error in sect. 24 of 22 & 23 Vict. c. 35, p. 278, *ante*].

IX. Where any trustee, executor, or administrator shall apply for the opinion, advice, or direction of a judge of the Court of Chancery under the thirtieth section of the Act of the twenty-second and twenty-third of her present Majesty, chapter thirty-five, the petition or statement shall be signed by counsel, and the judge by whom it is to be answered may require the petitioner or applicant to attend him by counsel either in chambers or in court where he deems it necessary to have the assistance of counsel (*i*). Form of applying for advice of judge, &c., under section 30 of 22 & 23 Vict. c. 35.

(*i*) See *ante*, pp. 282, 283.

X. It shall be lawful for the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal of England, with the advice and assistance of the Master of the Rolls, the Lords Justices of the Court of Appeal in Chancery, and the Vice-Chancellors of the said court, or any three of them, and for the Lord Chancellor of Ireland, with the advice and assistance of the Lords Justices of Appeal and the Master of the Rolls in Ireland, to make such general orders from time to time as to the investment of cash under the control of the Court (*j*), either in the Three per Cent. Consolidated or Reduced or New Bank Annuities, or in such other stocks, Power to Lord Chancellors, &c., of England and Ireland to make general orders as to investment of cash under the control of the Court.

23 & 24 Vict. c. 38, s. 10.

funds, or securities as he or they shall, with such advice or assistance, see fit; and it shall be lawful for the Lord Chancellor, Lord Keeper, or Lords Commissioners in England, and for the Lord Chancellor in Ireland, to make such orders as he or they shall deem proper for the conversion of any Three per Cent. Bank Annuities now standing or which may hereafter stand in the name of the Accountant-General of the said Court of Chancery, in trust in any cause or matter, into any such other stocks, funds, or securities upon which, by any such general order as aforesaid, cash under the control of the Court may be invested; all orders for such conversion of Bank Annuities into other funds or securities to be made upon petition to be presented by any of the parties interested in a summary way, and such parties shall be served with notice thereof as the Court shall direct (*k*).

Cash *under control of Court*,

(*j*) *In Re Briscoe*, 4 N. R. 311, L. J. Turner doubted whether money paid in under the Lands Clauses Act in respect of a lunatic's estate could be ordered to be invested under this section, but the same monies being transferred to an account in lunacy, were directed to be so invested. See, however, *Wall* v. *Hall*, 11 W. R. 298, where the section seems to have been applied to monies paid in under the Settled Estates Act, and the monies were allowed to be invested on mortgage, though the 23rd section of the Act specifies only Exchequer Bills or 3*l.* per cent. stock, see note (*k*), p. 246, *ante*; and compare *Re Birmingham Bluecoat School*, 1 L. R. Eq. 632, where the section was applied to enlarge the investments allowed by a private Act.

may be invested in Bank Stock, East India Stock, &c.;

(*k*) See the Order of Feb. 1, 1861, *post*, which provides that: "1. Cash under the control of the Court (see note (*j*), *supra*) may be invested in Bank Stock, East India Stock, Exchequer Bills, and 2*l.* 10*s.* per Cent. Annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales; as well as in Consolidated 3*l.* per Cent. Annuities, Reduced 3*l.* per Cent. Annuities, and new 3*l.* per Cent. Annuities.

in special cases,

The Court is not bound to grant every petition for conversion from Bank Annuities into the securities mentioned in the order, *Cockburn* v. *Peel*, 3 D. F. J. 170 (decided by the full Court of Appeal). And it seems that when there are no special circumstances in the case, such as exigencies in the family which make it desirable for the children entitled in remainder that their parents' income should be increased, the application will be refused, see *Re Langford*, 2 J. & H. 458; *Re Boyce* (before the M. R. in Ireland), 15 W. R. 827. Where there are such special circumstances the Court exercises a liberal discretion, *Peillow* v. *Brookings*, 4 L. T. N. S. 731, where the tenant for life had a wife and five children and an income not exceeding 70*l.*; and see *Equitable Reversionary Interest Society* v. *Fuller*, 1 J. & H. 379; *Bishop* v. *Bishop*, 9 W. R. 549: and compare *Cohen* v. *Waley*, *ibid.* 137; decided before the issuing of the order. In *Mortimer* v. *Picton*, 12 W. R. 292, it was held that where the primary object of the trusts on which funds are held (in that case the payment of 500*l.*, in lieu of jointure, to the plaintiff) would otherwise be defeated, the Court will authorise a change of investments.

to increase the income of tenant for life,

or carry out the primary object of the trusts.

Where a married woman had a life interest in the fund, and was also entitled absolutely in the event of her having no children, there being little probability of her having children, V.-C. Kindersley allowed an invest-

ment in East India Stock, *Vidler* v. *Parrott*, 12 W. R. 976. And where an applicant was very poor, the usual provision against receiving three dividends in the year by reason of the change was omitted, *Re Ingram*, 11 W. R. 980. 23 & 24 Vict. c. 38, s. 10.

Compare as to the discretion of the Court under the section, *Hume* v. *Richardson*, 10 W. R. 528, where the Lords Justices held that a trustee acting according to his *bonâ fide* discretion, was justified, *as the Court would be*, both in retaining money already invested in English and Irish Bank Stock and East India Stock, and in making a fresh investment in those securities (see section 11, *infra*). Discretion of Court.

In *Ungless* v. *Tuff*, 9 W. R. 729, the Court made no special declaration in the decree, but sanctioned generally investment in real securities, and gave liberty to apply in chambers. Liberty to apply in chambers.

The costs of an application to vary an investment are generally payable out of income, *Equitable Reversionary Interest Society* v. *Fuller*, 1 J. & H. 379; *secus*, where a petition would in any case have been necessary, *Re Langford*, 2 J. & H. 458. Costs of application.

The trustees are to be served with the petition, and such other persons, if any, as the Court may think fit, Ord. Feb. 1, 1861, r. 2. Service.

XI. When any such general order as aforesaid shall have been made it shall be lawful for trustees, executors, or administrators having power to invest their trust funds upon Government securities, or upon Parliamentary stocks, funds, or securities, or any of them, to invest such trust funds, or any part thereof, in any of the stocks, funds, or securities in or upon which by such general order cash under the control of the Court may from time to time be invested (*l*). Trustees, &c., to invest trust funds in the stocks, &c., in which cash under the control of the Court may be invested.

(*l*) See note (*k*), *supra*, for the securities in which trustees may invest under this section, and see notes (*s*) and (*t*), p. 285, *ante*, for the securities in which they may invest under other Acts. Investments by trustees.

Sect. 12 provides that s. 32 of 22 & 23 Vict. c. 35, relating to investments by trustees on mortgage or East India Stock, &c., *ante*, p. 285, shall operate retrospectively.

[Sect. 13 recites 3 & 4 Will. 4, c. 27, s. 40, which provides that money charged on land and legacies are to be deemed satisfied at the end of twenty years, if there shall be no interest paid or acknowledgment in writing in the meanwhile, and extends that enactment to the case of claims to the estates of persons dying intestate by providing that after Dec. 31, 1860, "no suit or "other proceeding shall be brought to recover the personal estate, or any share "of the personal estate, of any person dying intestate, possessed by the legal "personal representative of such intestate, but within twenty years next after "a present right to receive the same shall have accrued to some person capable "of giving a discharge for or release of the same, unless in the meantime some "part of such estate or share, or some interest in respect thereof shall have been "accounted for or paid, or some acknowledgment of the right thereto shall have "been given in writing, signed by the person accountable for the same, or his "agent, to the person entitled thereto, or his agent; and in such case no such "action or suit shall be brought, but within twenty years after such accounting, "payment, or acknowledgment, or the last of such accountings, payments, or "acknowledgments, if more than one was made or given." As to what cases come within this section, see Shelford's R. P. Statutes, 248—262]. Right to property of intestate barred after twenty years.

XIV. The order to take an account of the debts and Order to take account of

23 & 24 Vict. c. 38, s. 14.

debts, &c., of deceased person under section 19 of 13 & 14 Vict. c. 35, may be made immediately after probate granted.

liabilities affecting the personal estate of a deceased person, pursuant to the nineteenth section of the Act of the thirteenth and fourteenth years of Victoria, chapter thirty-five (*m*), may be made immediately, or at any time after probate or letters of administration shall have been granted; and such order may be made either by the Court of Chancery upon motion or petition of course, or by a judge of the said court, sitting at chambers, upon a summons in the form used for originating proceedings at chambers; and after any such order shall have been made, the said Court or judge may, on the application of the executors or administrators, by motion or summons, restrain or suspend, until the account directed by such order shall have been taken, any proceedings at law against such executors or administrators by any person having, or claiming to have, any demand upon the estate of the deceased, by reason of any debt or liability due from the estate of the deceased, upon such notice and terms and conditions (if any) as to the said Court or judge shall seem just; and the judge, in taking an account of debts and liabilities pursuant to any such order, shall, on the application of the executors or administrators, be at liberty to direct that the particulars only of any claim or claims which may be brought in pursuance to any such order shall be certified by his chief clerk, without any adjudication thereon; and any notices for creditors to come in which may be published in pursuance of any such order shall have the same force and effect as if such notices had been given by the executors or administrators in pursuance of the twenty-ninth section of the Act of the twenty-second and twenty-third years of Victoria, chapter thirty-five.

(*m*) See note (*w*), p. 126, *ante*.

Act not to extend to Scotland, &c.

XV. This Act is not to extend to Scotland, nor are any of the clauses, except clause six and the subsequent clauses, to extend to Ireland.

ATTORNIES AND SOLICITORS ACT.

23 & 24 VICT. CAP. 127.

SS. XXVII., XXVIII., XXIX.

See *ante*, pp. 28—31.

CHANCERY EVIDENCE COMMISSION ACT.

23 & 24 VICT. CAP. 128.

An Act to enable the Lord Chancellor and Judges of the Court of Chancery to carry into effect the Recommendations and Suggestions of the Chancery Evidence Commissioners by General Rules and Orders of the Court.

[28*th August*, 1860.

23 & 24 Vict. c. 128.

WHEREAS by commissions under the Great Seal, dated respectively the eighteenth day of August and the thirteenth day of October, one thousand eight hundred and fifty-nine, commissioners were appointed to inquire into the mode of taking evidence in the High Court of Chancery and its effects: And whereas two reports from the said commissioners have since been made to Her Majesty: And whereas doubts have been entertained whether effect can be given to the recommendations and suggestions of the said reports by general orders of the Court without the authority of Parliament: Be it declared and enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:

Power for Lord Chancellor and judges to make general rules and orders for carrying recommendations of the Chancery Evidence

I. The Lord Chancellor, with the advice and assistance of the Master of the Rolls, the Lords Justices of the Court of Appeal in Chancery, and the Vice-Chancellors, or any three of them, may from time to time, as the Lord Chancellor with such advice and assistance as aforesaid may think fit, make general rules and orders for carrying

23 & 24 Vict. c. 128, s. 1.

Commissioners' Reports into effect.

the said recommendations and suggestions of the said reports or any of them, or any part thereof, into effect, and in relation to all matters consequential thereon or incidental thereto, and so far as to them shall seem expedient for varying and adding to the course of proceeding recommended in the said reports in respect of the matters to which the said reports relate; and such rules and orders may from time to time be rescinded or altered by the like authority; and all such rules and orders shall take effect as if they had been general rules and orders of the Court duly made (*a*).

(*a*) See Order, February 5, 1861, *post*.

Such general rules and orders to be laid before Parliament.

II. Provided always, that all such general rules and orders as aforesaid shall immediately after the making and issuing thereof be laid before both Houses of Parliament, if Parliament be then sitting, or if Parliament be not then sitting within five days after the next meeting thereof; and if either of the Houses of Parliament shall, by any resolution passed within thirty-six days after such rules or orders have been laid before such Houses of Parliament, resolve that the whole or any part of such rules or orders ought not to continue in force, in such case the whole or such part thereof as shall be so included in such resolution shall from and after such resolution cease to be binding.

Act not to abridge, &c., powers of Lord Chancellor, &c., making general orders.

III. Nothing herein contained shall be construed to abridge or affect the powers of making general rules and orders which the Lord Chancellor, either alone or with such advice and assistance as aforesaid, might have exercised if this Act had not passed.

TRUSTEES AND MORTGAGEES ACT.

23 & 24 VICT. CAP. 145.

An Act to give to Trustees, Mortgagees, and others certain Powers now commonly inserted in Settlements, Mortgages, and Wills (*a*). [28*th August*, 1860.

23 & 24 Vict. c. 145.

WHEREAS it is expedient that certain powers and provisions which it is now usual to insert in settlements, mortgages, wills, and other instruments, should be made incident to the estates of the persons interested, so as to dispense with the necessity of inserting the same in terms in every such instrument: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows (*a*):

Extent of application of the Act.

(*a*) It must be remembered that this Act only applies (see sect. 34) to persons entitled or acting under instruments executed after 28 Aug. 1860. Its operation (see sect. 32) may be negatived by express declaration; and it only provides for the case of the simplest and most ordinary instruments, so that it seems rather intended to supply defects in ill-drawn wills and settlements, than to supersede the labours of the skilled conveyancer; and as it is generally desirable that each particular instrument should enable trustees to ascertain their powers and duties in relation to sales, &c., the general provisions of the Act are seldom made use of.

PART I.

Powers of Trustees for Sale, &c., and Trustees of Renewable Leaseholds.

Trustees empowered to sell may sell in lots, and either by auction or private contract.

I. (*b*) In all cases where by any will, deed, or other instrument of settlement it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale, either generally, or in any particular event, over any hereditaments named or referred to in or from time to time subject to the uses or trusts of such will, deed, or other instrument, it shall be lawful for such trustees or other persons, whether such hereditaments be vested in them or not, to exercise such power of sale by selling such hereditaments, either together or in lots, and either by auction or private contract, and either

23 & 24 Vict. c. 145, s. 1.

at one time or at several times, and (in case the power shall expressly authorise an exchange) to exchange any hereditaments which for the time being shall be subject to the uses or trusts aforesaid for any other hereditaments in England or Wales or in Ireland (as the case may be), and upon such exchange to give or receive any money for equality of exchange.

(*b*) See Lewin, 321, 323.

Sale may be made under special conditions, and trustees may buy in, &c.

II. It shall be lawful for the persons making any such sale or exchange to insert any such special or other stipulations, either as to title or evidence of title, or otherwise, in any conditions of sale, or contract for sale or exchange, as they shall think fit, and also to buy in the hereditaments or any part thereof at any sale by auction, and to rescind or vary any contract for sale or exchange, and to resell the hereditaments which shall be so bought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby, and no purchaser under any such sale shall be bound to inquire whether the persons making the same may or may not have in contemplation any particular re-investment of the purchase-money in the purchase of any other hereditaments or otherwise (*c*).

(*c*) See Lewin, 321, 323.

Trustees exercising power of sale, &c., empowered to convey.

III. For the purpose of completing any such sale or exchange as aforesaid, the persons empowered to sell or exchange as aforesaid shall have full power to convey or otherwise dispose of the hereditaments in question, either by way of revocation and appointment of the use, or otherwise, as may be necessary (*d*).

(*d*) See Lewin, 323.

Monies arising from sales, &c., to be laid out in other lands:

IV. (*e*) The money so received upon any such sale or for equality of exchange as aforesaid shall be laid out in the manner indicated in that behalf in the will, deed, or instrument containing the power of sale or exchange, or if no such indication be therein contained as to all or any part of such money, then the same shall with all conve-

nient speed be laid out in the purchase of other hereditaments in fee simple in possession to be situate in England or Wales or in Ireland (as the case may be), or of lands of a leasehold or copyhold or customary tenure which, in the opinion of the persons making the purchase, are convenient to be held therewith or with any other hereditaments for the time being subject to the subsisting uses or trusts of the same will, deed, or other instrument of settlement in which the power of sale or exchange was contained; and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be freeholds of inheritance shall be settled and assured to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations, to which the hereditaments sold or given in exchange were or would have been subject, or as near thereto as the deaths of parties and other intervening accidents will admit of, but not so as to increase or multiply charges; and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be of leasehold or copyhold or customary tenure shall be settled and assured upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, and declarations, as shall as nearly as may be correspond with and be similar to the aforesaid uses, trusts, intents, and purposes, powers, provisoes, and declarations, but not so as to increase or multiply charges, and so that if any of the hereditaments so to be purchased shall be held by lease for years the same shall not vest absolutely in any tenant in tail by purchase who shall not attain the age of twenty-one years; and any such purchase as aforesaid may be made subject to any special conditions as to title or otherwise: Provided that no leasehold tenement shall be purchased under the powers hereinbefore contained which is held for a less period than sixty years (*e*). 23 & 24 Vict. c. 145, s. 4.

(*e*) No provision is made by this section for the destination of leasehold property, which by the operation of this section may be divested from a tenant in tail by purchase dying under twenty-one.

V. Provided nevertheless, that it shall be lawful for or in payment

23 & 24 Vict. c. 145, s. 5.

of incumbrances.

the persons exercising any such power as aforesaid, if they shall think fit, to apply any money to be received upon any sale or for equality of exchange as aforesaid, or any part thereof, in lieu of purchasing lands therewith, in or towards paying off or discharging any mortgage or other charge or incumbrance which shall or may affect all or any of the hereditaments which shall then be subject to the same uses or trusts as those to which the hereditaments sold or given in exchange were or was subject.

Money arising from sales, &c., not to be laid out, nor lands exchanged, elsewhere than in the country in which lands sold or exchanged are situated.

VI. No money arising from any such sale or exchange of lands or hereditaments in England or Wales shall be laid out in the purchase of lands or hereditaments situate elsewhere than in England or Wales, and no lands situate in England or Wales shall, under any such power as aforesaid, be exchanged for any lands or hereditaments situate elsewhere than in England or Wales; and no money arising from any such sale or exchange of lands in Ireland shall be laid out in the purchase of lands or hereditaments situate elsewhere than in Ireland, and no lands or hereditaments situate in Ireland shall, under any such power as aforesaid, be exchanged for any lands or hereditaments situate elsewhere than in Ireland.

Until purchase of lands, &c., money to be invested at interest.

VII. Until the money to be received upon any sale or for equality of exchange as aforesaid shall be disposed of in the manner herein mentioned, the same shall be invested at interest for the benefit of the same parties who would be entitled to the hereditaments to be purchased therewith as aforesaid, and the rents and profits thereof in case such purchase and settlement as aforesaid were then actually made (*f*).

(*f*) See, as to investments at interest, sect. 25, and note, p. 302, *post*.

Trustees of renewable leaseholds may renew.

VIII. It shall be *lawful* for any trustees of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract, or by custom or usual practice, if they shall in their *discretion* think fit, and it shall be the *duty* of such trustees, if thereunto *required* by any person having any beneficial

interest, present or future or contingent, in such leaseholds, to use their best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose it shall be lawful for any such trustees from time to time to make or concur in making such surrender of the lease for the time being subsisting, and to do all such other acts as shall be requisite in that behalf; but this section is not to apply to any case where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expense of renewing the same (*g*). 23 & 24 Vict. c. 145, s. 8.

(*g*) The provision at the end of this section was inserted at the instance of Lord St. Leonards, and will keep the power within narrow limits, see Lewin, 294.

IX. In case any money shall be required for the purpose of paying for equality of exchange as aforesaid, or for renewal of any lease as aforesaid, it shall be lawful for the persons effecting such exchange or renewal to pay the same out of any money which may then be in their hands in trust for the persons beneficially interested in the lands to be taken in exchange, or comprised in the renewed lease, whether arising by any of the ways and means hereinbefore mentioned or otherwise, and notwithstanding the provisions for the application of money arising from sales or exchanges hereinbefore contained; and if they shall not have in their hands as aforesaid sufficient money for the purposes aforesaid, it shall be lawful for such persons to raise the money required by mortgage of the hereditaments to be received in exchange or contained in the renewed lease (as the case may be), or of any other hereditaments for the time being subject to the subsisting uses or trusts to which the hereditaments taken in exchange or comprised in the renewed lease (as the case may be) shall be subject, and for the purpose of effecting such mortgage such persons shall have the same powers of conveying or otherwise assuring as are herein contained with reference to a con- Money for equality of exchange and for renewal of leases may be raised by mortgage, &c.

23 & 24 Vict. c. 145, s. 9.

veyance on sale; and no mortgagee advancing money upon such mortgage purporting to be made under this power shall be bound to see that such money is wanted, or that no more is raised than is wanted for the purposes aforesaid.

No sale, &c., to be made without consent of tenant for life, &c.

X. No such sale or exchange as aforesaid, and no purchase of hereditaments out of money received on any such sale or exchange as aforesaid, shall be made without the consent (*h*) of the person appointed to consent by the will, deed, or other instrument, or if no such person be appointed, then of the person entitled in possession to the receipt of the rents and profits of such hereditaments, if there be such a person under no disability; but this clause shall not be taken to require the consent of any person where it appears from the will, deed, or other instrument to have been intended that such sale, exchange, or purchase should be made by the person or persons making the same without the consent of any other person.

(*h*) See *Offen* v. *Harman*, 1 D. F. J. 253.

Part II.

Mortgagee's power of sale

[Ss. 11—16 make the powers of sale, &c. usually inserted in mortgages, incident to the estate of a mortgagee.

As to sales by mortgagees under the 15 & 16 Vict. c. 86, s. 48, see *ante*, p. 205.

of hereditaments of tenure.

Sect. 11 provides that "where any principal money is secured or charged by "deed on any *hereditaments of any tenure or on any interest therein*," (so that the section does not apply where the mortgage is of chattels personal, *e.g.*, of policies, or of hereditaments not the subject of tenure, as a personal annuity descending to the heir, see *Stafford* v. *Buckley*, 3 Ves. Sen. 170; *Ex parte Wynch*, 5 D. M. G. 218), "the person to whom such money shall for the "time being be payable, his executors, administrators, and assigns, shall, at "any time after the expiration of one year from the time when such principal "money shall have become payable, according to the terms of the deed, or after "any interest on such principal money shall have been in arrear for six months, "or after any omission to pay any premium on any insurance which, by the "terms of the deed, ought to be paid by the person entitled to the property "subject to the charge, have the following powers, to the same extent (but no "more) as if they had been in terms conferred by the person creating the charge; "namely,

"1st. A power to sell or concur with any other person in selling the whole "or any part of the property by public auction or private contract, sub-"ject to any reasonable conditions he may think fit to make, and to "rescind or vary contracts for sale, or buy in and resell the property, "from time to time in like manner:

"2nd. A power to insure and keep insured from loss or damage by fire the "whole or any part of the property (whether affixed to the freehold or "not) which is in its nature insurable, and to add the premiums paid

[" for any such insurance to the principal money secured at the same rate " of interest : 23 & 24 Vict. c. 145, s. 11.

" 3rd. A power to appoint or obtain the appointment of a receiver of the " rents and profits of the whole or any part of the property in manner " hereinafter mentioned."

Sect. 12 provides that the mortgagee's receipts for purchase-money shall be sufficient discharges.

Sect. 13 provides "that no such sale as aforesaid shall be made until after " six months' notice in writing given to the person, or one of the persons, entitled " to the property subject to the charge, or affixed on some conspicuous part of " such property ; but when a sale has been effected in professed exercise of the " powers hereby conferred, the title of the purchaser shall not be liable to be " impeached on the ground that no case had arisen to authorise the exercise of " such power, or that no such notice as aforesaid had been given ; but any person " damnified by any such unauthorised exercise of such power shall have his " remedy in damages against the person selling." Notice to be given before sale ; but purchaser relieved from inquiry as to circumstances of sale.

Sect. 14 provides that "the purchase-money shall be applied : first, in pay- " ment of all the expenses incident to the sale or incurred in any attempted sale ; " secondly, in discharge of interest and costs ; thirdly, in discharge of all the " principal monies then due ; and the residue shall be paid to the person entitled " to the property subject to the charge." Application of purchase-money.

Sect. 15 provides that "the person exercising the power of sale hereby con- " ferred, shall have power by deed to convey or assign to and vest in the pur- " chaser the property sold, for all the estate and interest therein, which the " person who created the charge had power to dispose of, except that in the case " of copyhold hereditaments the beneficial interest only shall be conveyed to and " vested in the purchaser by such deed." Conveyance to the purchaser.

Sect 16 provides that "at any time after the power of sale hereby conferred " shall have become exercisable, the person entitled to exercise the same shall " be entitled to demand and recover, from the person entitled to the property " subject to the charge, all the deeds and documents in his possession or power " relating to the same property, or to the title thereto, which he would have " been entitled to demand and recover if the same property had been conveyed, " appointed, surrendered, or assigned to and were then vested in him for all the " estate and interest which the person creating the charge had power to dispose " of ; and where the legal estate shall be outstanding in a trustee, the person " entitled to a charge created by a person equitably entitled, or any purchaser " from such person, shall be entitled to call for a conveyance of the legal estate " to the same extent as the person creating the charge could have called for such " a conveyance if the charge had not been made." Owner of charge may call for title deeds and conveyance of legal estate.

Sect. 17 provides for the appointment of a receiver, by the mortgagee ; and,

Sect. 18 provides that "every receiver appointed as aforesaid shall be deemed " to be the agent of the person entitled to the property subject to the charge, " who shall be solely responsible for his acts or defaults, unless otherwise pro- " vided for in the charge." See *Jones* v. *Smith*, 1 Hare 43, 72. If before this Act a mortgagee appointed a receiver, the possession of the receiver was, in the absence of any special stipulation, treated as the possession of the mortgagee. Receiver deemed to be agent of the mortgagor.

Sect 19 provides for the powers of such receiver ; sect. 20 for his removal ; sect. 21 for his payment by receiving a commission not exceeding five per cent.

By sect. 22 the receiver is to insure if required, and sect. 23 provides that "every receiver appointed as aforesaid shall pay and apply all the money " received by him in the first place in discharge of all taxes, rates, and assess- " ments whatsoever, and in payment of his commission as aforesaid, and of the " premiums on the insurances, if any, and in the next place in payment of all " the interest accruing due in respect of any principal money then charged on " the property over which he is receiver, or on any part thereof, and, subject as " aforesaid, shall pay all the residue of such money to the person for the time " being entitled to the property subject to the charge, his executors, adminis- " trators, or assigns." Duties of a mortgagee's receiver.

By sect 24 "the powers and provisions contained in this part of this Act " relate only to mortgages or charges made to secure money advanced or to be " advanced by way of loan, or to secure an existing or future debt."]

23 & 24 Vict. c. 145, s. 25.

Part III.

Provisions as to Investment of Trust Funds, Appointment and Powers of Trustees and Executors, &c.

On what securities trust funds may be invested.

XXV. (*i*) Trustees having trust money in their hands which it is their duty to invest at interest shall be at liberty, at their discretion, to invest the same in any of the Parliamentary stocks or public funds, or in Government securities, and such trustees shall also be at liberty, at their discretion, to call in any trust funds invested in any other securities than as aforesaid, and to invest the same on any such securities as aforesaid, and also from time to time, at their discretion, to vary any such investments as aforesaid for others of the same nature: Provided always, that no such original investment as aforesaid (except in the Three per Cent. Consolidated Bank Annuities), and no such change of investment as aforesaid, shall be made where there is a person under no disability entitled in possession to receive the income of the trust fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent in writing of such person (*k*).

Investments by trustees.

(*i*) Much more extensive powers in regard to investment are given by the previous Acts (as to which see notes (*s*) and (*t*), p. 285, and note (*l*), p. 291), and this section is therefore practically inoperative.

(*k*) See, as to this consent, *Norris* v. *Wright*, 14 Beav. 291, 303; *Wiles* v. *Gresham*, 2 Drew. 258; 5 D. M. G. 770.

Trustees may apply income of property of infants, &c., for their maintenance.

XXVI. In all cases where any property is held by trustees in trust for an infant, either absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such infant, or otherwise to apply for or towards the maintenance or education of such infant, the whole or any *part* of the income to which such infant may be *entitled* in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education, or not (*l*); and such trustees shall accumulate all

the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen: Provided always, that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year. 23 & 24 Vict. c. 145, s. 26.

(*l*) See Lewin, 419. Applications as to the maintenance and advancement of infants may be made in chambers, see note to 15 & 16 Vict. c. 80, s. 26, head (3), p. 146, *ante*.

Provisions for appointment of new trustees on death, &c.

XXVII. (*m*) Whenever any trustee, either original or substituted, and whether appointed by the Court of Chancery or otherwise, shall die, or desire to be discharged from or refuse or become unfit or incapable to act in the trusts or powers in him reposed, before the same shall have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will, or other instrument creating the trust (if any), or if there be no such person, or no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor or administrators or administrator of the last surviving and continuing trustee, or for the last retiring trustee, by writing, to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or desiring to be discharged, or refusing or becoming unfit or incapable to act as aforesaid; and so often as any new trustee or trustees shall be so appointed as aforesaid, all the trust property (if any) which for the time being shall be vested in the surviving or continuing trustees or trustee, or in the heirs, executors, or administrators of any trustee, shall with all convenient speed be conveyed, assigned, and transferred, so that the same may be legally and effectually vested in such new trustee or trustees, either solely, or jointly with the surviving or continuing

23 & 24 Vict. c. 145, s. 27.

trustees or trustee, as the case may require; and every new trustee or trustees to be appointed as aforesaid, as well before as after such conveyance or assignment as aforesaid, and also every trustee appointed by the Court of Chancery either before or after the passing of this Act, shall have the same powers, authorities, and discretions, and shall in all respects act, as if he had been originally nominated a trustee by the deed, will, or other instrument creating the trust.

Power to appoint new trustees.

(*m*) See sect. 32 of the Trustee Act, and note (*p*), thereto, pp. 98—100, *ante*. This section does not provide for the cases of a trustee residing abroad (comp. *Re Watts's Settlement*, 9 Hare, 106, and *Withington* v. *Withington*, 16 Sim. 104, with *Mennard* v. *Welford*, 1 Sm. & Gif. 426), nor for the case of all the trustees retiring simultaneously (*Stones* v. *Rowton*, 17 Beav. 308), nor for there being two sets of trustees of the same instrument (the surviving or continuing trustees of one set being not necessarily the best persons to appoint new trustees of the other set), nor for an augmentation or reduction of the number of trustees (see Lewin on Trusts; *Re Bathurst*, 2 Sm. & Gif. 169; *Meinertzhagen* v. *Davis*, 1 Coll. 355). See *ante*, p. 100.

Appointment of new trustees in cases herein named.

XXVIII. The power of appointing new trustees hereinbefore contained may be exercised in cases where a trustee nominated in a will has died in the lifetime of the testator.

Trustees' receipts to be discharges.

XXIX. The receipts in writing of any trustees or trustee for any money payable to them or him by reason or in the exercise of any trusts or powers reposed or vested in them or him shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof (*n*).

(*n*) See 22 & 23 Vict. c. 35, s. 23, and note p. 278, *ante*.

Executors may compound, &c.

XXX. It shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition, or any security, real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound, or submit to arbitration all debts, accounts, claims, and things whatsoever relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give,

and execute such agreements, instruments of composition, releases, and other things as they shall think expedient, without being responsible for any loss to be occasioned thereby (*o*). 23 & 24 Vict. c. 145, s. 30.

(*o*) See Williams on Executors, 1663.

Part IV.

General Provisions.

XXXI. For the purposes of this Act, a person shall be deemed to be *entitled to the possession or to the receipt of the rents* (*p*) and income of land or personal property, although his estate may be charged or incumbered, either by himself or by any former owner, or otherwise howsoever to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and income as aforesaid, unless they shall concur therein. Tenants for life, &c., may execute powers, notwithstanding incumbrances.

(*p*) Compare note (*w*), p. 45, *ante*.

XXXII. None of the powers or incidents hereby conferred or annexed to particular offices, estates, or circumstances shall take effect or be exercisable if it is declared in the deed, will, or other instrument creating such offices, estates, or circumstances that they shall not take effect; and where there is no such declaration, then, if any variations or limitations of any of the powers or incidents hereby conferred or annexed are contained in such deed, will, or other instrument, such powers or incidents shall be exercisable or shall take effect only subject to such variations or limitations. Powers, &c., hereby given may be negatived by express declaration.

XXXIII. Nothing in this Act contained shall be deemed to empower any trustees or other persons to deal with or affect the estates or rights of any person soever, except to the extent to which they might have dealt with or affected the estates or rights of such persons if the deed, will, or other instrument under which such trustees or other persons are empowered to act had contained express powers for such trustees or other persons so to deal with or affect such estates or rights. No persons other than those entitled under the settlement, &c., to be affected.

23 & 24 Vict. c. 145, s. 34.

Commencement of Act.

XXXIV. The provisions contained in this Act shall, except as hereinbefore otherwise provided, extend only to persons entitled or acting under a deed, will, codicil, or other instrument executed after the passing of this Act, or under a will or codicil confirmed or revived by a codicil executed after that date.

Extent of Act.

XXXV. This Act shall not extend to Scotland.

ACT FOR RELIEF OF PRISONERS IN CONTEMPT.

23 & 24 VICT. CAP. 149.

An Act to make better Provision for the Relief of Prisoners in Contempt of the High Court of Chancery, and Pauper Defendants; and for the more efficient Despatch of Business in the said Court. [28*th August*, 1860.

[Sect. 1 discharged the Masters in ordinary from the duty of visiting the Queen's Prison.]

23 & 24 Vict. c. 149, s. 2.

The Queen's prison to be visited quarterly.

II. In the last week in January, in the last week in April, in the last week in July, and in the last week in October in every year, the present solicitor to the suitors' fund, or in case of his illness or unavoidable absence, some officer of the Court of Chancery to be appointed by the Lord Chancellor from time to time during such illness or absence, and after the death or retirement of the present solicitor to the suitors' fund, the solicitor to the suitors' fund for the time being, or some other officer of the Court of Chancery to be appointed by the Lord Chancellor from time to time, shall visit the Queen's prison, and examine the prisoners confined there for contempt, and shall report his opinion on their respective cases to the Lord Chancellor, and thereupon it shall be lawful for the Lord Chancellor, if he shall think fit, to assign a solicitor to any such prisoner, not only for defending him *in formâ pauperis*, but generally for taking such steps on his behalf as the nature of the case may require, and to make all or any such orders as the Lord

Chancellor was empowered to make after the like report of a Master under the seventh rule of the said first hereinbefore recited Act, and all the provisions of the same rule shall apply to the reports hereby directed, and the orders to be made thereunder (*a*). 23 & 24 Vict. c. 149, s. 2.

(*a*) Upon the report of the solicitor to the Suitors' Fee Fund as to the poverty of the defendant committed, a solicitor and counsel will be assigned without an application to the Court (*Layton* v. *Mortimore*, 2 D. F. J. 353). Prisoner pleading in formâ pauperis.

III. It shall be lawful for the solicitor to the suitors' fund or other officer visiting the prison as aforesaid to examine the prisoners and all other persons whom he may think it proper to examine upon oath, and to administer an oath or oaths to any such prisoner and other persons accordingly, and to cause any officers, clerks, and ministers of any court of law or equity to bring and produce upon oath before him any records, orders, books, papers, or other writings belonging to the said courts, or to any of the officers within the same, as such officers. Prisoners and other persons may be examined on oath.

IV. In all cases where, in pursuance of the said sixth rule contained in the first hereinbefore recited Act, a defendant shall be brought to the bar of the court, and shall make oath that he is unable by reason of poverty to employ a solicitor to put in his answer, the Court, if not satisfied of the truth of that allegation, may direct an inquiry as to the truth thereof, and may appoint a solicitor to conduct such inquiry on the behalf of such defendant, and if it is ascertained by means of such inquiry, or if the Court is satisfied without such inquiry, that such defendant is unable by reason of poverty to employ a solicitor to put in his answer, the Court may thereupon make such order as is authorised by the said sixth rule after a report by a Master (*b*). Court may direct reference as to poverty of prisoners.

(*b*) See Ord. XII. 4, and notes, *post*.

V. When any person shall be committed to any prison other than the Queen's prison under any writ or order of the Court of Chancery, the gaoler or keeper of the prison in which such person shall be confined shall, within fourteen days after such person shall have been in the Gaolers to make reports to Lord Chancellor of all Chancery prisoners.

23 & 24 Vict. c. 149, s. 5.

custody of such gaoler or keeper, make a report to the Lord Chancellor, containing the name and description of such prisoner, with the cause and date of his commitment, and a copy of the writ or order under which he was committed; and if such prisoner shall make oath before one of the visiting justices of such gaol, or a commissioner for taking oaths in the Court of Chancery, that he is unable by reason of poverty to employ a solicitor, the report shall contain a statement to that effect, and it shall thereupon be lawful for the Lord Chancellor to direct the solicitor to the suitors' fund to ascertain the truth of such statement, and if true, to take such steps on behalf of any such prisoner as the nature of the case may require; and the Lord Chancellor may thereupon, if he shall see fit, make such order or orders as he is empowered to make under the second section of this Act.

Expenses incurred for prisoners and pauper defendants to be paid out of suitors' fund.

VI. The solicitor to the suitors' fund shall make the necessary and proper payments out of pocket which may be requisite in the proceedings taken on behalf of the prisoners and defendants under the order of the said Court, and shall be allowed the same as part of his disbursements in respect of the suitors' fund: Provided that if any such prisoner or defendant shall be or become entitled to any funds in the cause, such funds shall be applied in the repayment to the suitors' fund of the sums expended on his behalf as aforesaid: Provided also, that in case any prisoner or defendant shall become entitled to any costs in any such suit or proceeding, such costs shall be received by the solicitor to the suitors' fund, and paid by him into the suitors' fund (*c*).

(*c*) On a motion to discharge pauper defendants, to whom solicitor and counsel had been assigned under sect. 2, from custody, it was held that the Court had no power under this section to pay any part of the plaintiff's costs of suit out of the Suitors' Fee Fund, *Wand* v. *Woodcock*, 5 L. T. N. S. 817.

[Sect. 7 provides for payment of an additional salary to the solicitor to the Suitors' Fee Fund.]

Power to make general orders.

VIII. It shall be lawful for the Lord Chancellor, with the advice and assistance of the Master of the Rolls, the Lords Justices of the Court of Appeal in Chancery, and

the Vice-Chancellors, or any three of them, from time to time to make such general rules and orders for regulating the mode of procedure regarding commitments by the Court of Chancery for contempt and taking bills *pro confesso*, and for doing and effectuating any acts or proceedings which may heretofore have been required to be done by or under the direction or through the intervention of any of the Masters of the said court, the doing and effectuating of which has not been already provided for, and generally for carrying the purposes of this Act into effect, as may be found expedient. 23 & 24 Vict. c. 149, s. 8.

[Sects. 9—12 provide for the custody of deeds under the care of late masters, and for the appointment of a new chief clerk, &c.]

XIII. Where the Lord Chancellor is empowered by this Act to make orders or to give directions with respect to prisoners in contempt and pauper defendants, such orders and directions are to be made or given by the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the Great Seal of the United Kingdom, or the Lords Justices of the Court of Appeal in Chancery only: and where the Court of Chancery is empowered by this Act to make such orders or to give such directions, they may be made or given by any judge of the said court. By whom orders under this Act are to be made.

[The sections omitted relate exclusively to the appointment of another chief clerk, &c.]

CHANCERY AMENDMENT ACT, 1862.

25 & 26 VICT. CAP. 42.

See *ante*, p. 270.

TRANSFER OF LAND ACT, 1862.

25 & 26 VICT. CAP. 53.

An Act to facilitate the Proof of Title to, and the Conveyance of, Real Estates. [29*th July*, 1862.

25 & 26 Vict. c. 53.

WHEREAS it is expedient to give certainty to the title to real estates and to facilitate the proof thereof, and also to render the dealing with land more simple and economical, Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Extent of Act.

I. This Act shall apply to England only.

PART I.

AS TO THE REGISTRATION OF REAL ESTATES AND THE TITLE THERETO.

Registry to be established.

II. There shall be established a registry of the title to landed estates.

Limits of registry.

III. The registry shall be confined to estates of freehold tenure and leasehold estates in freehold lands.

By whom application for registration to be made.

IV. Application may be made for registration of title, by any of the following persons, viz. (*a*):

1. The owner of the fee simple.
2. Persons who collectively are owners of the fee simple, or have the power of acquiring the same:
3. Persons who have the power of appointing the fee simple:
4. Trustees for sale of the fee simple:
5. The owner of the first estate of freehold and first vested estate of inheritance (*b*):
6. Any purchaser of a fee simple, where his contract empowers him so to do, or the vendor consents:
7. Any person authorised by the Court of Chancery to make such application.

Application may be made, although the estate of

the person applying may be subject to charges and incumbrances. 25 & 26 Vict. c. 53, s. 4.

(*a*) When an application has to be made to the Court *ex parte* for its direction and decision as to whether the applicants are capable of applying to register under this section, such application ought to be made upon a statement of the facts in writing, certified to be correct by the registrar of the office, *Re Kennard*, 11 L. T. N. S. 585. Application to register, how made.

Trustees with a mere power of sale cannot apply alone, *Bradish* v. *Ellames*, 3 N. R. 632. Application by trustees with power of sale.

(*b*) Where A. was tenant for life and B. was entitled to the first vested estate of inheritance, liable to be divested by the birth of issue to A., it was held that A. and B. together might apply, and that "vested" in this section does not mean incapable of being divested, *ibid.* Vested estate.

Proceedings to obtain Registration of a Title as indefeasible.

V. On application for the registration of a title as indefeasible the title shall be examined by the registrar and examiners of title hereinafter mentioned in such manner as general orders shall direct: No title shall be accepted for registration as indefeasible unless it shall appear to be such as a court of equity would hold to be a valid marketable title. Examination of title with guarantee.

VI. Any question, doubt, or dispute as to any matter of title that may arise in the course of such investigation, may be referred to such *judge of the Court of Chancery* as the Lord Chancellor shall appoint to hear applications under this Act (*c*). Reference of questions of title.

(*c*) The Master of the Rolls is the judge appointed to hear these applications. See *Re Drew's Estate*, 1 L. R. Ch. 126; 2 L. R. Eq. 206.

VII. If the title shall (either absolutely or subject as aforesaid) appear to be good and marketable, the applicants shall furnish to the registrar, and he shall examine and settle for the purposes of registration: Particulars to be furnished to registrar.

First, an exact description of the lands to be registered:

Secondly, a statement of the persons, or classes or descriptions of persons, that are or may become entitled to such lands, and of the estates, powers, and interests that exist, or may arise or become vested in such persons respectively:

Thirdly, a statement of the mortgages, charges, and incumbrances affecting such lands or any part thereof, and of the persons entitled thereto, both at law and in equity:

25 & 26 Vict. c. 53, s. 7.

Copies of such description and statements when settled by the registrar shall be delivered back to the applicants: any objection to the same or to any part thereof, if not allowed by the registrar, shall, at the request of the applicants, be referred to and decided by the *judge of the Court of Chancery.*

May be verified on oath.

VIII. If required by the registrar, the description of the land furnished by the applicant shall be verified by his own oath or the oaths of persons having full means of information.

Claim to mines and minerals.

IX. It shall be stated in the description of the land to be so furnished by the applicant whether he does or does not claim to be entitled to all or any part of the mines and minerals under such land, and unless in such description mines or minerals shall be expressly mentioned, they shall be deemed not to be included therein; and if in such description mines or minerals shall be expressly mentioned, it shall be the duty of the registrar to have especial regard thereto in all subsequent inquiries to be made by him with respect to such lands, and in the investigation of the title thereto, and also in the service of such notices as hereinafter mentioned.

Identity of lands to be established.

X. The identity of the lands with the parcels or descriptions contained in the title deeds shall be fully established, and the registrar shall have power by such inquiries as he shall think fit to ascertain the accuracy of the description and the quantities and boundaries of the lands; and, except in the case of incorporeal hereditaments, a map or plan shall be made and deposited as part of the description.

Notice of intention to register.

XI. When such description has been settled, and the registrar is satisfied with the title shown to the land, and with the result of the inquiries made, he shall require such notices as general orders (*d*) shall direct to be given by public advertisement of his intention to register such land with an indefeasible title, at the expiration of a period not less than three months from the date of such advertisement.

(*d*) See the Land Registry Orders issued 1st Oct. 1862.

XII. Such notice shall contain a copy of the description of the land as proposed to be registered and the names and descriptions of the applicants for registration: a copy of such notice shall be served on every adjoining occupier, and the person (if any) to whom such occupier pays rent, and on the lord of the manor in any case in which the lands are situate within or held of any manor, and also on every person not having already had notice of the application, who shall appear to have or claim any estate or interest in or right over the land, or any part thereof, and on such other persons as under the special circumstances of each case shall be deemed necessary. 25 & 26 Vict. c. 53, s. 12. Contents of notice.

The notice shall also state the place, time, and manner at and in which any party may be heard to show cause against such registration.

XIII. At the time and place named in the notice, or at such time and place as general orders shall direct, any person may attend and show cause before the registrar, by affidavit or otherwise, against the registration, or claim that the same should be subject to any conditions or reservations; the registrar may decide on such objection or claim, or may refer the same to the *judge of the Court of Chancery:* if the registrar decide, either party may appeal from his decision to the said Court, in manner hereinafter directed. Cause may be shown against registration.

XIV. If at the expiration of the time named in such notice there shall be no objection to the registration applied for or none allowed, and no appeal pending, or, if any appeal shall be then pending, as soon as any objection to such registration shall have been finally disallowed by the Court of Appeal, or the appeal withdrawn, the registrar shall complete such registration in manner following; that is to say, Completion of registration.

First, the registrar shall enter in a book to be called "The Register of Estates with an indefeasible Title" such description of the estate as shall be finally approved of, and shall annex thereto any map or plan which shall be deemed necessary, and shall distinguish the estate so entered by a particular

25 & 26 Vict. c. 53, s. 14.

number or numbers, and the entry shall refer to another book to be entitled "The Record of Title to Lands on the Registry:"

Secondly, in the last-mentioned book, under the same number or numbers, shall be entered in concise terms an exact record of the existing estates, powers, and interests in the land so registered as aforesaid, and the names and descriptions of the persons or classes of persons that are or may become entitled thereto respectively:

Thirdly, in a book to be entitled "The Register of Mortgages and Incumbrances" shall be entered under the same number or numbers an account of all the charges and incumbrances affecting the lands or any part thereof, or the estate or interest therein of any person named in the record of title.

Books may be inspected.

XV. Subject to such directions as may be given by general orders, the aforesaid books of registry may be inspected by the owners of the estates and interests, or of the mortgages and incumbrances recorded therein, or their respective solicitors or agents: no other person shall be permitted to inspect such books, except under an order of the *Court of Chancery*.

As to exception, &c., in record of title.

XVI. In the record of title so made as aforesaid, it shall be competent for the registrar to specify or define any exception or qualification or condition affecting the whole of the interests so recorded, or any of them, and also to reserve expressly the right of any person or class of persons, and to describe any outstanding right or possibility of claim or interest subject to which such registration is made; and if there shall be any disputed question of boundary between the applicants and any proprietor of adjoining land which shall not have been previously determined by any competent authority, it shall be competent for the parties or either of them to object in writing to the determination of such question by the registrar or by a *judge of the Court of Chancery* under this Act, and if any such objection shall be made, the registrar shall specify upon the record of title the existence of such dis-

puted question of boundary and that the registration is made subject thereto. 25 & 26 Vict. c. 53, s. 17.

Any question as to the true construction of any deed, &c., to be referred by registrar to a judge of Court of Chancery.

XVII. If in making up, or afterwards continuing, such record of title as aforesaid, any question shall arise as to the true construction or legal validity or effect of any deed, instrument, or will, or as to the persons entitled, or the extent or nature of the estate, right, or interest, power or authority of any person or class of persons, or the mode in which any entry ought to be made in the record of title, or any doubtful or uncertain right or interest stated or dealt with by the registrar, it shall be competent for the registrar or for any of the parties interested, to refer the same to a *judge of the Court of Chancery:* if, on such reference, the judge, having regard to the parties appearing before him, shall think proper to decide the question, he shall have power to do so, or to direct any proceeding at law or in equity to be instituted for that purpose, or at his discretion and without deciding such question, to direct such particular form of entry to be made on the record of title as under the circumstances shall appear to be right (*e*).

(*e*) See *Re Drew's Estate*, cited in note (*c*) to sect. 6, p. 311, *ante*.

Registrar may refer in record of title to deed, &c., for estates of parties.

XVIII. In any case described in the preceding section, the registrar may, at the request of the parties or at his own discretion, refer in the record of title to the deed, will, or other instrument for the estates and interests of the parties, instead of setting out or describing the same: Provided always, that in every case in which such deed, will, or other instrument shall be so referred to, a copy thereof (which shall be verified and printed in the manner hereinafter directed with respect to deeds or instruments conveying, mortgaging, or charging the estate or interest of any proprietor on the register,) shall be delivered to the registrar by the parties applying for registration, and shall be preserved in the registry; and for the purposes of any subsequent sale, mortgage, or contract for valuable consideration by any person appearing thereby to have any estate or interest in the land to which the record of title so made up shall relate, such copy shall be conclu-

25 & 26 Vict. c. 53, s. 19.

sive evidence of the contents of the said deed, without the production of the original thereof.

Persons entitled to principal money, &c., not to be entered in record of title unless registrar thinks fit.

XIX. The names of the persons entitled to the proceeds of any trust for sale of the lands so registered, or to any principal money to be raised by virtue of any change under the trusts of any estate or term, shall not be entered in the register unless the registrar shall think fit so to do, but the estate of the trustees shall be defined and the purpose of the trust shortly described.

When an indefeasible Title shall arise.

Persons described in record of title to be deemed as possessed of such estates, &c.

XX. Subject to any exception, qualification, or condition mentioned in such record of title, and to any right or interest thereby reserved, and to any registered charges or incumbrances, and to such charges and interests (if any) as are herein declared not to be incumbrances, the persons originally and from time to time named and described in such record of title as aforesaid shall, for the purposes of any sale, mortgage, or contract for valuable consideration by such persons respectively, be and be deemed to be as from the date of registering such record by the registrar, or from such time as shall be fixed by him therein, absolutely and indefeasibly possessed of and entitled to such estates, rights, powers, and interests as shall be defined and expressed in such record against all persons, and free from all rights, interests, claims, and demands whatsoever, including any estate, claim, or interest of Her Majesty, her heirs and successors.

Informality not to prejudice entry in record of title.

XXI. No entry in such record of title as aforesaid shall be set aside or called in question as against any person who may afterwards become interested therein under any sale, mortgage, or contract for valuable consideration, by reason of any irregularity or informalty in the proceedings previous to the making thereof.

Before registration applicant and solicitor or agent, &c., to make oath that all

XXII. Before the final registration of any land with an indefeasible title, the applicant and his solicitor or agent, or certificated conveyancer, and such other person or persons as the registrar shall require, shall make oath that

all deeds, wills, and writings relating to the title of the lands, or any part thereof, and all facts material to the title thereto, and all charges, liens, incumbrances, contracts, and dealings affecting the same or any part thereof, or giving any right as against the applicant, have to the fullest extent of their respective knowledge, information, and belief been made known to the registrar. 25 & 26 Vict. c. 53, s. 22. deeds, &c., have been made known to registrar.

XXIII. If at any time before registration the registrar is of opinion that any further or other evidence is necessary, he may refuse to complete the registration until such further or other evidence shall have been produced. Power to registrar to refuse registration.

XXIV. The registrar shall, before taking any proceeding on an application for registration with an indefeasible title, require the applicant to give such security for costs as general orders shall direct; and it shall be lawful for the registrar and for the *judge of the Court of Chancery* respectively to order the costs and expenses properly incurred of any person properly appearing upon any proceeding taken under this Act for the purpose of such registration to be paid by the applicant. Power to registrar to demand security for costs.

Proceedings for Registration without an indefeasible Title.

XXV. Application for registration without an indefeasible title may be made by any person, subject to the following conditions: Registration without guarantee of title may be made under certain conditions.

1. The applicant shall prove to the satisfaction of the registrar that he, or some person under whom he claims, has been in the actual enjoyment or receipt of the rents and profits of the land as owner of the fee simple thereof, continuously and without interruption, for a period of ten years immediately preceding the time of such application:
2. The last deed or will (if any) under which the applicant derives title shall be produced to the registrar:

   If the applicant claims as heir-at-law, evidence shall be given that the ancestor was in the enjoyment of the estate as owner thereof at the time of his decease:

25 & 26 Vict. c. 53, s. 25.

3. The rules above enacted as to the description of the land to be registered shall apply, and the registrar shall adopt the same course, and take the same proceedings, for the purpose of ascertaining the accuracy of the description of the lands and of the boundaries thereof, as are hereinbefore directed with respect to registration with an indefeasible title:

4. A statutory declaration shall be made by the applicant and his solicitor or agent, or certificated conveyancer, and, if necessary, any other person whose evidence may be deemed necessary by the registrar, that they respectively believe the applicant to be, either alone or jointly with other persons to be named and described, (and subject to any qualification, condition, or exception which shall be stated,) well entitled to the fee simple of the lands proposed to be registered:

5. If the land be registered, the registrar shall, in the record of title, define the time, event, or circumstances from and after which an indefeasible title shall attach: when the time has arrived, the event happened, or the defined circumstances exist, *a judge of the Court of Chancery* may, upon proof thereof, and if there be no other objection, after such and the like notices as are hereinbefore required in case of an application for registration of a title as indefeasible shall have been duly given, direct a transfer of the land to the register of estates with an indefeasible title (*f*), and thereupon the registrar shall make up a proper record of the title to such land, and the applicant and other persons named in such record of title shall have the same estates, rights, and privileges as if the land had been registered with an indefeasible title:

6. Subject to the enactments herein contained, the registration of any person as owner of land without an indefeasible title shall not prejudice any estate, right, or interest created or existing at or before the date of such registration.

(*f*) The application should be by summons in chambers, see sect. 146.

Registration of Leasehold Estates.

25 & 26 Vict. c. 53, s. 26.

XXVI. Leasehold estates, namely, lands demised for terms of years of which fifty years are still to come and unexpired, or demised for lives or for years determinable with lives, and in which two lives at least are still subsisting, may be registered with an indefeasible title in a similar manner and subject to the same or similar directions and rules of proceeding as are herein contained with respect to freehold lands: such application may be made by persons having such estates and interests in the leasehold estates as are similar or correspondent to the estates and interests of the persons entitled to apply for the registry of freehold land: no indefeasible title shall, in the case of a leasehold, extend to the title of the lessor or grantor of the same: such further directions shall be observed with regard to leasehold estates as shall be given from time to time by general orders.

Leasehold estates may be registered in like manner as freehold lands.

General Provisions as to Title.

XXVII. The following charges and liabilities shall not be deemed incumbrances within the meaning of this Act; namely,

1. Land tax, succession duty, tithe rentcharges, rents payable to the Crown:
2. Public rights of way, liability to repair highways by reason of tenure, rights of way, watercourses, and rights of water, and other easements or servitudes, rights of common, manorial rights and franchises:
3. Leases or agreements for leases not exceeding twenty-one years, where there is an actual occupation under the same:

Nevertheless, where any such charges or liabilities appear or are discovered in the course of proceeding prior to registration, the registrar shall, in such manner as he shall think fit, notice in the register the existence of such charges or liabilities.

Charges and liabilities not to be deemed incumbrances.

XXVIII. Land entered on the register may, at the option of the proprietor, be registered as one estate or as

Land may be registered as one estate.

25 & 26 Vict. c. 53, s. 28.

separate estates; but the particulars of each estate, and any transactions relating thereto, shall, subject to any regulations to the contrary that may be made by general order, form a separate record in the register, distinguished by a separate number, or in such other manner as the registrar may determine.

Registered land made subject to certain conditions, &c.

XXIX. If land registered or proposed to be registered or any part thereof, be subject, or be agreed to be made subject, to any condition, as, for example, that it shall not be built upon, or used in a particular manner, or any other legal condition, notice thereof shall be entered in the "record of title," and any transfer, demise, or charge of such land shall be subject to such condition; but it shall be lawful for *the Court of Chancery* to discharge, alter, or modify any such condition upon hearing all parties who may be entitled to claim under or against the same.

Notice of registration of land to be given by registrar to interested person.

XXX. So soon as any land is registered, if there shall appear to be any charge or incumbrance affecting such land or any part thereof which is entered in the register of incumbrances (the owner of which has not had notice of the application), notice of such registration shall be immediately given by the registrar to the person entitled or interested in such charge or incumbrance.

Judicial declaration of title.

XXXI. If any *judicial declaration of the title* (*g*) to any land shall be made by the Court of Chancery under any Act which may be passed in the present session for the purpose of enabling persons having interests in land to obtain a judicial declaration of their title to the same, so as to enable them to make an indefeasible title to persons claiming under them, as purchasers for valuable consideration, the land as to which any such declaration may be made may, at the option of the person obtaining the same, be entered upon the register of estates with an indefeasible title under this Act when and so soon as the time allowed for appealing under any such Act as last aforesaid shall have expired, or (if any appeal shall be prosecuted) when and so soon as any such declaration shall be affirmed by the last Court of Appeal, or the

appeal withdrawn; and the title to such land, as the same shall be declared by the Court, shall in such case be entered upon the record of title to lands on the registry under this Act, and such land shall thenceforth be subject to the provisions of this Act in the same manner in all respects as if the registration thereof had been made by virtue of proceedings duly taken for the registration of an indefeasible title thereto under this Act. 25 & 26 Vict. c. 53, s. 31.

(*g*) See, now, sect. 21 of the Declaration of Title Act, p. 327, *post*.

Every estate, &c., to be entered in record of title after registration of land.

XXXII. From and after the registration of any land, every estate or interest, use, trust, mortgage, charge, lien, right, or title granted, declared, arising, becoming vested or in any manner created, or coming into existence in, to, upon, out of, or affecting such land or any part thereof (except as herein excepted), shall be entered, described, or noticed in the record of title or register of incumbrances to be so kept as aforesaid.

Estates of registered proprietors subject to existing law.

XXXIII. Subject to the enactments herein contained, the estates and interests of all registered proprietors shall remain subject to the existing law, and may be dealt with, assured, devised, and transmitted by descent or representation according to the ordinary rules of law and equity.

Power to registered proprietor, with consent of persons interested, to close register.

XXXIV. The registered proprietor of land may, with the consent of all persons appearing by the register to be interested in such land, remove the same from the register, and thereupon the register shall as respects such land be deemed to be closed.

Caveat against Entry of Land on Register.

Caveats may be lodged with registrar, to the effect that cautioner is entitled to notice.

XXXV. Any person having or claiming such an interest in land as entitles him to object to any disposition thereof being made without his consent may lodge a caveat with the registrar, to the effect that the cautioner is entitled to notice of any application that may be made for registration of such land, and appointing a place within Great Britain for the service of such notice.

25 & 26 Vict. c. 53, s. 36.

Caveat to be supported by affidavit.

XXXVI. The caveat shall be supported by an affidavit, stating the nature of the interest of the cautioner, and such other matters as may be required by the registrar.

How notice to be served.

XXXVII. Notice may be served on the cautioner either personally or by sending it through the post to the address stated in the caveat.

After caveat, no registration to be made of lands till ten days after notice.

XXXVIII. After a caveat has been lodged, no registration shall be made of any lands to which such caveat refers until notice has been served on the cautioner to appear and oppose such registration, and ten days have expired since the date of the service of such notice, or until the cautioner has entered an appearance, which may first happen.

Compensation if caveat lodged without reasonable cause.

XXXIX. If any person wrongfully and without reasonable cause lodges a caveat with the registrar, he shall be liable to make to any person who may have sustained damage by the lodging of such caveat such compensation as *a judge of the Court of Chancery* shall deem just (*h*).

(*h*) For mode of application see note (*f*), p. 318, and note (*k*), *infra*.

Caveat not to prejudice title of any person.

XL. A caveat lodged in pursuance of this Act shall not prejudice the claim or title of any person, and shall have no effect whatever, except to entitle the cautioner to receive such notice as is hereinbefore mentioned of any application made for registration of land.

Part II.

SIMPLIFICATION OF TITLE BY JUDICIAL SALES.

Sales by Court of Chancery.

Sales of land may be made by the Court, on application by owner.

XLI. Sales may be made (*i*) by the Court of Chancery of land with an indefeasible title, upon the application, by petition or otherwise (*k*), as general orders may direct, of any of the persons who are hereinbefore empowered to apply for registration of title (*l*).

Sale with indefeasible title.

(*i*) It seems that the Court has no jurisdiction under this section, except in cases where it has otherwise jurisdiction to order a sale, *e.g.*, under the Settled Estates Act, or a private act, *Bradish* v. *Ellames*, 10 Jur. N. S. 251.

Application by summons.

(*k*) Until any general order is made as here provided, applications under the Act are to be made by summons in chambers, sect. 134, p. 338, *post*.

(*l*) See sect. 4, *ante*, p. 310, and note thereto.

25 & 26 Vict. c. 53, s. 42.

Application to be served on parties.

XLII. Such application shall be served on such persons as the Court shall think fit, before a preliminary order is made (*m*).

(*m*) For form of order, see *Re Ellames*, 13 W. R. 170 ; and as to the mode of applying for it, see note (*n*), *infra*.

Court shall provide for examination of title, &c., before making order for sale.

XLIII. By its preliminary order or orders, the Court shall provide for the examination of the title to the land, and the ascertainment of a correct description thereof, and shall also make such inquiries as to the parties interested, either as incumbrancers, owners, or otherwise, and direct such notices to be given as are hereinbefore directed (*n*) on the occasion of application to the registrar for registration of an indefeasible title, and shall also direct such other notices, if any, to be given as it thinks necessary to enable it to form a judgment as to the propriety of a sale, and shall hear by themselves, their counsel or agents, any persons interested in such land who may apply (*o*) to them to be heard, and shall, upon the conclusion of such inquiries, and after hearing such parties, if any, as aforesaid, make such order as to the sale of such lands as it thinks just.

(*n*) For directions as to advertisements, see sects. 11, 12, *ante*, p. 312 ; and Land Registry Orders, 1 Oct. 1862.

If the preliminary order is considered insufficient, further special directions should be applied for *by petition*, *Re Ellames*, l. c. ; see note (*c*), *supra*.

Advertisement for adverse claimants.

(*o*) Where six adverse claimants came in in consequence of advertisements, V.-C. Malins, on summons by the applicant, fixed a period (about seven weeks) within which claimants must bring in evidence of title ; any claimant showing a probable case to have proper opportunity of trying his right, otherwise an order for sale with indefeasible title to be made, *Bradish* v. *Ellames*, 15 W. R. 380.

Applicant to give security for costs.

XLIV. Before making any order the Court may require the applicant to give security for costs.

Purchase-money to be paid into the bank as Court may direct.

XLV. The purchase money on any sale made by the Court shall be paid as the Court may direct ; and the Court may make an order vesting the land in the purchaser, subject or not, as the case may require, to the incumbrances specified in such order (*p*), and subject in all cases to such charges or interests as may be subsisting thereon, and are hereinbefore declared not to be incumbrances within the meaning of this Act.

(*p*) As to what charges and liabilities are not incumbrances within the Act, see sect. 27, p. 319, *ante*.

25 & 26 Vict. c. 53, s. 46.

Such payment to exonerate purchaser from liability.

XLVI. The payment of the purchase money in manner directed by the Court shall exonerate the purchaser from all liability whatsoever with respect to the same.

Vesting order to be stamped.

XLVII. Any vesting order by the Court shall bear the same stamp as if it were a conveyance made by an ordinary vendor.

Applicant for sale and his solicitor may be examined concerning title before vesting order made.

XLVIII. Before any vesting order is made as aforesaid, the applicant for the sale or his solicitor may be personally examined by the Court, or required to give satisfactory evidence as to the fact that all settlements, deeds, wills, and instruments of title, and all charges and incumbrances affecting the title to the land which is the subject of the application, and all facts material to such title, have been disclosed, and that there is not to their or either of their knowledge, information, or belief any deed, charge, or incumbrance affecting the title to the said land, nor any fact material to the said title, not fully and fairly disclosed as aforesaid: the Court may require any person proposing to make an affidavit in pursuance of this section to state in his affidavit what means he has had of becoming acquainted with the several matters referred to in this section, and if the Court is of opinion that any further or other evidence is necessary, it shall not make such vesting order until such further or other evidence is produced.

Where sales are made under 20 Vict. c. 120, the Court may make order as under this Act.

XLIX. Where any sale of the fee simple of land is about to be made under the order of the Court of Chancery, in pursuance of an Act passed in the twentieth year of the reign of Her present Majesty, chapter one hundred and twenty, and intituled "An Act to facilitate Sales and Leases of Settled Estates," or of any Act amending the same, or in pursuance of any other order of the Court, the Court of Chancery may, on the application of any parties interested in such sale, take such steps as are hereinbefore directed, and, if satisfied of the propriety of so doing, may make an order directing the land to be put up for sale with an indefeasible title, and also an order vesting the land in a purchaser, and any such vesting order shall have the same effect as if it had been made on an application to the Court under this part of this Act.

25 & 26 Vict. c. 53, s. 50.

Vesting order to confer on person in whom land is vested an estate in fee simple, with all rights, privileges, &c.

L. Every vesting order made by the Court of Chancery in pursuance of this part of this Act shall confer on the person in whom the land is vested an estate in fee simple, together with all rights, privileges, and appurtenances therewith enjoyed, or reputed as belonging or appurtenant thereto, subject to the incumbrances, exceptions, or qualifications, if any, appearing in the order, and subject also to such charges and interests, if any, as are hereinbefore declared not to be incumbrances, but free from all other estates, rights, incumbrances (*q*), and interests whatsoever, including all estates, interests, and claims of Her Majesty, her heirs and successors.

(*q*) See note (*p*), *supra*.

Court may make a qualified vesting order, where title is shown for a limited period only.

LI. Where upon an application being made for a sale by the Court of Chancery it is proposed that a good title should be shown to the purchaser for a limited period only, the Court may make a qualified vesting order, declaring by a statement contained in such order, or by endorsement thereon, or by such other manner as the Court thinks fit, that the title is to be deemed to commence from the date of some specified instrument or at or on some specified time or event.

Effect of qualified vesting order.

LII. A qualified vesting order shall not affect or prejudice any estate, title, or interest in or to such land created or arising prior to the date at which the title is stated to commence, but, save as aforesaid, shall have the same effect as an absolute vesting order.

Court of Chancery may require production of deeds, &c.

LIII. The Court of Chancery may, in the course of any proceedings relating to land wherein a vesting order is sought to be obtained, require all persons having any deeds or evidences of title relating to such land, who are bound by law so to do, to produce the same to the Court, upon such terms and subject to such conditions as the Court may think just (*r*).

(*r*) See notes p. 75, *ante*, as to privileged documents.

Distribution of monies paid into bank.

LIV. The Court of Chancery shall determine the rights and priorities of the several persons entitled to or interested in any money payable under this part of this Act,

25 & 26 Vict. c. 53, s. 54.

and shall distribute the same among such persons in accordance with such rights and priorities.

As to disposal of money not immediately distributable.

LV. Where any money is payable in pursuance of this Act, and is not immediately distributable, or the parties entitled thereto cannot be ascertained, or where from any other cause the Court thinks it expedient for the protection of the rights of the parties interested therein, it may order such money to be placed to such account as the Court directs, in trust to attend the orders of the Court, and it may by its order declare the trusts affecting such money so far as it has ascertained the same, or state the facts found by it in relation to the rights and interests therein, and generally the Court may make such orders with respect to any such money, and the investment or application thereof, or the payment thereof out of court, as the circumstances of the case require.

As to disposal of deeds after vesting order made.

LVI. When the Court of Chancery has made a vesting order of land in pursuance of this part of this Act, all such deeds and evidences of title delivered to the Court as relate exclusively to the land, and which the purchaser is entitled to, shall be delivered to him; and all other deeds and evidences of title delivered to the Court relating to the land or to any part thereof shall be returned to the parties entitled to the custody thereof, but previously to the same respectively being so delivered or returned they shall be stamped or otherwise marked in such manner as to give notice to any person inspecting such deeds or evidences of title of the proceedings taken by the Court in relation to the land or any portion of the land comprised in such deeds.

Vesting order to direct entry on register.

LVII. Every such vesting order may direct the registrar to enter the name of the person entitled on the register as the proprietor of the land with an indefeasible or qualified title, as the case may be, and in such case the order shall

Contents of vesting order.

state the name and description of the person entitled, and describe the lands to be registered, with the addition of the incumbrances, if any, affecting such lands, and such other matters as the Court thinks fit to insert therein, including, in the case of an applicant entitled only to a qualified

vesting order, a statement of the time or event at or on which the title, as registered, is to commence. 25 & 26 Vict. c. 53, s. 57.

LVIII. The registration of any person as first proprietor of land with a qualified title shall not affect or prejudice the right of any person claiming any estate, title, or interest created or arising prior to the time or event at or on which the title is stated on the register to commence, but, save as aforesaid, shall have the same effect as registration with an indefeasible title. Registration with a qualified title not to affect prior claims.

LIX. Where upon the first registration of the land under a vesting order notice of any incumbrance affecting such land has been entered on the register, the registrar shall, on proof of the discharge of such incumbrance, enter a memorandum of such discharge on the register, and upon such entry being made the incumbrance shall be deemed to be discharged. Entry of discharge of incumbrance.

LX. Where any order has been made by the Court of Chancery vesting land in a purchaser, or where any person has been registered with an indefeasible title under a vesting order, any person aggrieved by such order or registration may apply to the Court of Chancery to be reimbursed for any injury he may have sustained, out of any purchase money that may be remaining in court. Compensation to persons aggrieved.

LXI. In every proceeding under this Act the Court shall have full power and discretion as to the giving or withholding costs and expenses, and as to the persons by whom and the funds out of which the same shall in the first instance or ultimately be paid, repaid, and borne, and may direct the same to be paid to or apportioned among such persons as it sees fit. As to costs and expenses.

LXII. The Lord Chancellor may from time to time assign the duties by this part of this Act vested in the Court of Chancery to any particular judge or judges of that Court, and may appoint such new or additional clerk or clerks as to him may seem necessary for enabling such judge or judges duly to execute the duties imposed on it, and every such additional clerk shall receive out of the Suitors' Fee Fund such salary as the Lord Chancellor may think proper. As to asisgnment of duties.

25 & 26 Vict. c. 53, ss. 63–77.

Part III.

Conveyance, &c., by means of land certificate.

[Sects. 63—67 provide by what dispositions and forms registered land may be conveyed. By sects. 68—73 the Registrar is, on request, to deliver to the owner of registered land a *land certificate*, for the purpose of manifesting the exact nature of his estate and interest, and such certificate may be deposited, &c., instead of title-deeds. Sects. 74—77 provide for the entry of dealings with the land on the register.]

Where estate transmitted to any person by descent such person to be registered.

LXXVIII. Where the estate or interest of a registered proprietor is transmitted on his death to any other person by descent, will, or representation, such other person shall be entered on the register in the place of the deceased proprietor: if such person cannot be ascertained, or there shall be any doubt, dispute, or litigation touching the ownership of the estate of such deceased proprietor, it shall be lawful for the Court of Chancery to appoint a person to be registered in the room of such deceased proprietor as the representative of such estate or interest.

[Sects. 79—88 provide for the entry of wills, bankruptcies, and dispositions on the register.]

Part IV.

GENERAL PROVISIONS TO FACILITATE REGISTRATION.

Money charge not ascertained, &c., may be referred to judge at chambers.

LXXXIX. If on the examination of any title it shall appear that the land or any part of it is subject to any money charge or incumbrance, the ownership of which is not ascertained, or the right to which is doubtful or uncertain, or to any doubtful or uncertain right or claim which may be estimated or compensated by money, and does not involve a right to the land itself otherwise than as a security for money, the case may, at the request of the applicant for registration, be referred to a judge of the Court of Chancery sitting in chambers for the purpose of determining whether such right or claim and the costs of any party entitled by virtue thereof can be justly provided for by payment of money into Court, and if so to fix the sum to be so paid in, and direct the investment and application of the interest thereof; and after such payment shall have been made the land and the title thereto shall be

wholly discharged from such right, claim, charge, or incumbrance as fully as if the same had never existed. 25 & 26 Vict. c. 53, s. 90.

Judge may order money not distributable, &c., to be paid into Court of Chancery.

XC. Where any part of the money arising from the sale of a registered estate is not immediately distributable, or the persons entitled thereto cannot be fully ascertained, it shall be competent for one of the judges of the Court of Chancery, on any application for that purpose made with the concurrence of the registrar, to direct any sum of money arising from such sale to be paid into the Court of Chancery, or otherwise invested, and to declare the account or purpose to or for which such money is to be transferred or holden, and afterwards to make all such orders touching such money, and the investment, application, and distribution thereof, as the circumstances of the case may require.

Deeds to be stamped.

XCI. When an estate is entered on the register, whether with or without an indefeasible title, all such deeds and evidences of title as shall be produced to the registrar, under any of the provisions aforesaid, shall be stamped or endorsed in such a manner, under the direction of the registrar, as to give notice to any person to whom such deeds or instruments may be afterwards produced that the land, or some portion of the land comprised therein, has been registered under this Act.

Judge may decide questions of priority of incumbrances, &c.

XCII. If in any proceeding under this Act any question shall arise respecting the priority of any charges or incumbrances, claims or interests, it shall be competent to the registrar to report the same to a judge of the Court of Chancery, who shall have power to summon all parties interested to attend him either in court or at chambers, and to decide all questions touching the priority and relative rights of the parties, as fully as if they were parties to a suit instituted for the purpose.

As to Restraint of Conveyance.

As to restrictions on conveyance, &c., of land.

XCIII. Where the registered proprietor of any land or charge is desirous for his own sake, or at the request of some person beneficially interested in such land or charge, to place restrictions on transferring or charging such land or charge, such proprietor may, upon application to the

25 & 26 Vict. c. 53, s. 93.

registrar, direct that no transfer shall be made of or charge created on such land or charge, unless the following things, or such of them as he may prescribe, are done; (that is to say,)

Unless notice of any application for a transfer or creation of a charge is transmittted by post to such address as he may specify to the registrar:

Unless the consent of some person or persons, to be named by such proprietor, is given to the transfer or creation of a charge:

Unless some such other matter or thing is done as may be required by the applicant and approved by the registrar.

Registrar to make a note of such restrictions.

XCIV. The registrar shall thereupon make a note of such directions on the record of title of such proprietor, or otherwise as he shall think fit, and no transfer shall be made or charge created except in conformity with such directions; and any such directions may at any time be withdrawn or modified at the instance of all the persons for the time being appearing to the registrar to be interested in such directions, and shall also be subject to be set aside by the order of a judge of the Court of Chancery.

Court of Chancery may exercise powers of 13 & 14 Vict. c. 60.

XCV. For the purpose of authorizing or compelling a transfer to be made of any registered land or charge, the Court of Chancery may exercise all such powers as are vested in it by the Trustee Act, 1850, or by any Act amending the same, in relation to transfers of stock (*o*).

Vesting orders.

(*o*) See note (*v*), p. 82, and (*y*), p. 83, *ante*, and sect. 20 of the Trustee Act, 1850, p. 89, *ante*.

Caution.

Person interested may lodge caution with registrar.

XCVI. Any person interested under an agreement, or otherwise howsoever, in any land or charge registered in the name of any other person, may lodge a caveat with the registrar to the effect that no disposition of such land or charge be made until notice has been served upon the cautioner.

Caution to be supported by affidavit.

XCVII. The caveat shall be supported by an affidavit made by the cautioner or his agent, in such form as the registrar shall direct, stating the nature of the interest of

the cautioner, and such other matters as may be required by the registrar. 25 & 26 Vict. c. 53, s. 98.

Statutory disposition of land not to be registered until notice served on cautioner.

XCVIII. After any such caveat has been lodged in respect of any land or charge, the registrar shall not register any disposition thereof until he has served notice on the cautioner, warning him that his caveat will cease to have any effect after the expiration of twenty-one days next ensuing the date of such notice ; and after the expiration of such time as aforesaid the caveat shall cease, unless an order to the contrary is made by the Court of Chancery, and upon the caveat so ceasing the land or charge shall be dealt with in the same manner as if no caveat had been lodged.

Cautioner to give security against damage sustained by delay of disposition of property.

XCIX. If before the expiration of the said period of twenty-one days the cautioner, or some other person on his behalf, appears before the registrar, and enters into a bond, with sufficient security, conditioned to indemnify every person against any damage that may be sustained by reason of any disposition of the property being delayed, the Court of Chancery may thereupon, if it thinks fit so to do, make an order on the registrar requiring him to delay registering any disposition of the property for such further period as is mentioned in the order.

Compensation for lodging caution without reasonable cause.

C. If any person lodges a caveat with the registrar, he shall be liable to make, to any person who may have sustained damage by the lodging of such caveat, such compensation as a judge of the Court of Chancery shall deem just.

Injunction.

Court of Chancery may issue order restraining disposition of land, &c.

CI. The Court of Chancery may, without prejudice to the exercise of any other power of the Court, upon the application of any person interested in any registered land made in such manner as the Court directs, issue an order restraining for a time, or until the occurrence of an event to be named in such order, or generally until further order, any disposition of any land or charge.

Court of Chancery may annex terms, &c., to such order.

CII. The Court may make or refuse any such order, and annex thereto any terms or conditions it may think fit, and discharge such order when granted, with or with-

25 & 26 Vict. c. 43, s. 102.

out costs, and generally act in the premises in such manner as the justice of the case requires; and the registrar, without being made a party to the proceedings, upon being served with such order or an official copy thereof, shall obey the same.

Jurisdiction of courts of equity.

CIII. Nothing contained in this Act shall take away or affect the existing jurisdiction of Courts of Equity, on the ground of actual fraud.

Acts relating to registries in Middlesex and York not to apply to land on register under this Act.

CIV. The provisions of the several Acts of Parliament now in force relating to the registries which have been established in the counties of Middlesex and York shall cease to be applicable to any land situate in the said counties respectively, so soon as the same land has been put upon the register under the provisions of this Act, and whilst it remains thereon.

Penalty on Fraud, &c.

[By sects. 105 and 106, a person making a false statement in proceedings under the Act is to be deemed guilty of a misdemeanor, and to be punishable accordingly.]

Answers to bills, questions, &c., not admissible in evidence.

CVII. Nothing in this Act contained shall entitle any person to refuse to make a complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding, in any Court of Law or Equity, or in the Court of Bankruptcy; but no answer to any such bill, question, or interrogatory shall be admissible in evidence against such person in any criminal proceeding.

[Sects. 108—113 relate to the constitution of the office of Land Registry and the appointment of the Registrar and his assistants, &c.]

General Provisions.

Crown, &c., lands.

CXIV. With respect to lands vested in Her Majesty, her heirs or successors, either in right of the Crown or of the duchy of Lancaster or otherwise, or vested in any public officer or body in trust for the public service, the public officer or body having the management thereof, if any, or, if none, then such person as Her Majesty, her heirs or successors, shall by writing under her sign manual appoint, may and shall (whether the land be vested in him

or them or not) represent the owner of such lands for all the purposes of this Act, and shall be entitled to such notices, and may make and enter any such application or caveat, and do all such other acts, as any owner of lands for an estate in fee simple is entitled to receive, make, enter, or do under the provisions of this Act; and with respect to lands belonging to the duchy of Cornwall, such person as the Duke of Cornwall for the time being, or as the personage for the time being entitled to the revenues and possessions of the duchy of Cornwall, shall in writing appoint, may and shall act as and represent the owner of such lands for all the purposes of this Act, and shall be entitled to receive such notices, and may make and enter any such application or caveat, and do all such other acts as any owner of lands for an estate in fee simple is entitled to receive, make, enter, or do under the provisions of this Act; and it shall be sufficient that any oaths, affidavits, or declarations required by this Act be taken or made by any such public officer, body, or person as in this section mentioned, or by any person nominated in writing by any such public officer, body, or person, and in either case, without any solicitor joining in any affidavit or declaration; and it shall not be necessary for any such public officer, body, or person as in this section mentioned to enter into any such bond as in this Act mentioned, nor to give any security for costs, nor shall they or any of them be liable in damages except for any acts done wrongfully and without reasonable cause. 25 & 26 Vict. c. 53, s. 114.

Provision as to applications made by married women.

CXV. Where any married woman is desirous of making any application, giving any consent, or doing any act, or becoming party to any proceeding under this Act, her husband's concurrence shall be required, and she shall be examined apart from her husband touching her knowledge of the nature and effect of the application or other act, and it shall be ascertained that she is acting freely and voluntarily; and such examination may be taken by the Court or by such persons as are authorized to take acknowledgments of deeds by married women under the Act of the third and fourth years of King William the Fourth,

Examinations may be taken under 3 & 4 Wm. 4, c. 74.

25 & 26 Vict. c. 53, s. 115.

chapter seventy-four, "for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance;" and the form and manner in which such examination is to be certified to the Court shall be determined by the general rules and orders to be made under this Act: a married woman entitled to her separate use, and not restrained from anticipation, shall for the purposes of this Act be deemed a feme sole.

Provision for other persons under disability.

CXVI. Where any person who (if not under disability) might have made any application, given any consent, done any act, or been party to any proceeding under this Act, is a minor, idiot, or lunatic, the guardian or committee of the estate respectively of such person may make such applications, give such consents, do such acts, and be party to such proceedings, as such person respectively, if free from disability, might have made, given, done, or been party to, and shall otherwise represent such person for the purposes of this Act; where there is no guardian or committee of the estate of any such person as aforesaid, being infant, idiot, or lunatic, or where any person the committee of whose estates if he were idiot or lunatic would be authorized to act for and represent such person under this Act is of unsound mind or incapable of managing his affairs, but has not been found idiot or lunatic under an inquisition, it shall be lawful for the Court of Chancery to appoint a guardian of such person for the purpose of any proceedings under this Act, and from time to time to change such guardian; and where the Court sees fit it may appoint a person to act as the next friend of a married woman for the purpose of any proceeding under this Act, and from time to time remove or change such next friend.

Registrars, &c., may administer oaths, &c.

CXVII. The registrars and assistant registrars are hereby empowered to administer oaths and take statutory declarations in lieu of oaths in all proceedings under this Act.

As to loss of land certificate.

CXVIII. If any land certificate is lost or destroyed, the registrar may, upon being satisfied of the fact of such loss or destruction, grant a new land certificate in the place

of the former one, and shall state upon the face thereof that it is granted in substitution for the former certificate; but no such new certificate shall be of any avail against any person who may have already derived title under the former certificate. 25 & 26 Vict. c. 53. s. 118.

CXIX. The registrar may, upon the delivery up to him of a land certificate, grant a new certificate in the place of the one delivered up. Granting of new certificates.

CXX. The Lord Chancellor, with the advice and assistance of any two of the judges of the Court of Chancery, shall from time to time make such general rules and orders as he may see fit for carrying the purposes of this Act into effect, and for regulating the times, form and mode of procedure, and generally the practice of the Court in respect of the matters of this Act, and such rules and orders may from time to time be rescinded or altered by the like authority; and all such rules and orders shall take effect as general orders of the Court. Lord Chancellor to make rules and orders for carrying into effect purposes of Act.

CXXI. The Lord Chancellor may from time to time assign the duties vested in the Court of Chancery in relation to the matters of this Act to any particular judge or judges of that Court, and may appoint such new or additional clerk or clerks as to him may seem necessary for enabling such judge or judges duly to execute such duties; and every such additonal clerk shall receive out of the Suitors' Fee Fund such salary as the Lord Chancellor may think proper. As to assignment of duties and appointment of additional clerks.

CXXII. The registrar shall, with the sanction of the Lord Chancellor, frame, and cause to be printed and promulgated, as he sees occasion, forms of applications, and directions indicating the particulars of the information to be furnished when any application is made to him under this Act, and also forms of instruments, and such other forms and directions as he may deem requisite or expedient for facilitating proceedings under this Act. Forms to be printed and promulgated.

CXXIII. A seal shall be prepared for the Land Registry Office; and any instrument purporting to be sealed with such seal shall be admissible in evidence. Seal of land registry office.

CXXIV. A place of address shall be given to the regis- Addresses of

25 & 26 Vict. c. 53, s. 124.

trar for every person in England whose name is entered on the register of title as proprietor of land, of a charge, or as cautioner, or as entitled to receive any notice, or in any other character.

proprietors to be registered.

Registrar may frame general orders.

CXXV. The registrar shall, with the sanction and under the direction of the Lord Chancellor, from time to time frame general orders for regulating the manner of registering land, the examination of titles, the transfer, transmission, and withdrawal of official notes and caveats, the keeping the registers of title and assurances, and generally for the due execution of the provisions of this Act, and for giving effect to the objects thereof.

Such orders to have effect as Act of Parliament.

CXXVI. Any general orders so made by the registrar with such sanction as aforesaid shall be of the same force as if enacted by Parliament: they may from time to time be rescinded, added to, amended, or altered in like manner.

Fees.

Registrar to determine amount of fees.

CXXVII. The registrar shall, with the sanction of the Lord Chancellor, determine the amount of payments to be made with respect to the following matters:

The first entry on the register of title of land and charges on land:

The registration of transfers and transmissions of land and charges, and all other matters to be done by the registrar:

The registration of instruments and the withdrawal of such instruments:

And the registrar may, with the like sanction, from time to time alter any amounts so determined, but all payments mentioned in this section shall be paid into the receipt of Her Majesty's Exchequer, and carried to the account of the Consolidated Fund of the United Kingdom of Great Britain and Ireland.

Matters to be considered in determining amount of fees.

CXXVIII. In determining the amount of fees payable in respect of entries on the register of title under this Act, regard shall be had to the following matters:

1. In the case of the registration of land or of any

transfer of land on the occasion of a sale,—to the value of the land as determined by the amount of purchase money: 25 & 26 Vict. c. 53, s. 128.

2. In the case of the registration of land, or of any transfer of land not upon a sale,—to the value of the land, to be ascertained in such manner as may be directed by general order:

3. In the case of registration of a charge, or of any transfer of a charge,—to the amount of such charge:

Subject, nevertheless, to the qualifications following:

A maximum amount shall be fixed, and in cases where the value of any land or the amount of any charge exceeds such maximum, fees may be made payable in respect of such excess on such a reduced scale as may be thought expedient:

Where increased labour is thrown on the registrar by reason of the severance of the parcels of an estate, the entry of a new description of parcels, or of any other matter, an increased sum may be charged.

Collection of fees.

CXXIX. The following rules shall be observed with respect to the collection of fees:

1. All fees payable in respect of registration shall be received by stamps denoting the amount of fees payable, and not in money:

2. When any fee is payable in respect of a document, a stamp denoting the amount of fee shall be affixed to such document:

3. The Commissioners of Inland Revenue shall provide everything that is necessary for the collection of the monies hereby directed to be paid by stamps.

Stamp Acts applied to stamps under this Act.

CXXX. The several Acts for the time being in force relating to stamps under the care or management of the Commissioners of Inland Revenue shall apply to the stamps to be provided in pursuance of this Act, and to any document on which such stamps may be impressed, and to collecting and securing the sums of money denoted by stamps, and to preventing, detecting, and punishing all frauds, forgeries, and other offences relating thereto, as fully as if such provisions had been herein repeated and

25 & 26 Vict. c. 53, s. 130.

specially enacted with reference to the said last-mentioned stamps and sums of money respectively.

Lord Chancellor may fix scale of costs.

CXXXI. The Lord Chancellor may from time to time fix a scale of fees to be paid to the examiners of title, and also of costs to be paid to solicitors or certificated conveyancers, in respect of any service rendered by them in any matter relating to proceedings under this Act; and he may from time to time alter any such scale when fixed, and any scale of costs so fixed may, if the Lord Chancellor thinks fit, be based on an *ad valorem* principle.

Costs of registration may, in certain cases, be raised by mortgage.

CXXXII. Where registration is made on the application of parties who cannot make a valid charge on the fee simple, the Court of Chancery may declare that the costs and expenses of registration may be raised by a mortgage of the fee simple, and the same shall be charged accordingly.

Orders to be laid before Parliament.

CXXXIII. All general orders, scales of fees, and costs made and fixed under this Act, shall be laid before Parliament forthwith, if Parliament is sitting, or if not, within fourteen days after the next sitting of Parliament.

Proceedings in Court of Chancery.

Applications to Court of Chancery to be by summons.

CXXXIV. All applications to be made to the Court of Chancery under this Act may be made by summons in chambers; and any power by this Act given to the Court of Chancery may, subject to any order by the Lord Chancellor as aforesaid, be exercised by any judge of the court sitting in chambers; such judge shall have the power of directing any matter before him to be argued in court, and of directing any bill to be filed or action to be brought that may be necessary: any person aggrieved by an order made by a judge of the Court of Chancery may appeal to the Court of Appeal in Chancery, in such manner, within such time, and subject to such regulations and limitations, as the Lord Chancellor may prescribe; and any order made by the Court of Appeal in Chancery on appeal shall be subject to reversal or modification by the House of Lords, in like manner as decrees made by the Court of Chancery: provided that such appeal is made within such

time and subject to such regulations as the House of Lords may provide by any standing order (*o*). 25 & 26 Vict. c. 53, s. 134.

(*o*) See as to proper course of proceeding in such a case, *Ex parte Anon.*, 5 N. R. 230.

Extension to solicitors of counties Palatine of Durham and Lancaster.

CXXXV. Any proceeding, matter, or thing whatsoever directed or required by the provisions of this Act to be done or performed by solicitors of the High Court of Chancery, either in the exercise of their profession of solicitors or as attesting witnesses to any deed or instrument for the transfer of land, mortgage, document, or other instrument under the provisions of this Act, or in any other manner whatsoever, shall and may be done, exercised, and performed by any solicitor of the Courts of Chancery of the Counties Palatine of Durham and Lancaster.

Forms.

Forms.

CXXXVI. The forms in the schedule hereto shall be used in all matters to which they refer: the Registrar, with the sanction of the Lord Chancellor, may from time to time make such alterations in such forms contained in the schedule hereto as he deems requisite: he shall publish any form, when altered, in the *London Gazette*, and upon such publication being made it shall have the same force as if it were included in the schedule to this Act.

Inspection of Register.

Inspection of register.

CXXXVII. Subject to such regulations as may be imposed, and to the payment of such sums as may be fixed by the Registrar with the sanction of the Lord Chancellor, any person registered as proprietor of any estate or interest in any land or charge, and any person authorized by any such proprietor, or by an order of the Court of Chancery, but no other person, may inspect and make copies of and extracts from any register or document in the custody of the Registrar relating to such land or charge.

[By sects. 138—9, a person fraudulently procuring an order of the Court of Chancery under the Act, is to be deemed guilty of a misdemeanor and punishable accordingly.]

25 & 26 Vict. c. 53, s. 140.

Interpretation of terms.

CXL. In the construction of this Act (except where the context or other provisions require a different construction), the word "person" shall include Her Majesty, her heirs and successors, and the Duke of Cornwall for the time being, and also a body politic or corporate; the word "possession" shall include receipt of the rents and profits; the word "land" shall include messuages, tenements, and hereditaments, corporeal or incorporeal: and the word "incumbrance" shall mean any legal or equitable mortgage in fee or for any less estate, and also any money secured or charged on land by a trust, or by judgment, decree, or order of any superior Court of Law or Equity, and also any legacy, portion, lien, or other charge whereby a gross sum of money is secured to be paid, and also any annual or periodical charge which by the instrument creating the same, or by any other instrument, is made repurchasable on payment of a gross sum of money, and also any arrear remaining unpaid of any annual or periodical charge, for payment of which arrear a sale of any land charged therewith might be decreed by a Court of Equity.

SCHEDULE.

Form of Transfer of Land.

Dated this day of

I A. B. of, &c., in consideration of [five thousand pounds] paid to me, grant to C. D. &c., and his heirs, for ever, all [*insert description*].

(*Signed and sealed by A.B.*)

Witness,

E. F. of. &c.,

A solicitor of the High Court of Chancery,

or a certificated conveyancer.

Form of Mortgage.

Dated this day of

I A. B., in consideration of [five thousand pounds] lent

to me by C. D., grant to C. D. and his heirs the hereditaments as described in the schedule, to secure to C. D. the payment of the principal sum of [five thousand pounds] on the day of and interest at five per cent. in the meantime, half-yearly. C. D. shall have power to sell on default of payment of the principal or interest or any part thereof respectively. 25 & 26 Vict. c. 53.

(*Signed and sealed, &c.*)

Witness (*as above*).

FORM OF TRANSFER BY INDORSEMENT.

I, the within named A. B., in consideration of [five thousand pounds] paid to me by C. D., transfer to C. D. the within mentioned lands.

Dated, &c.

(*Signature and seal*).

Witness (*as above*).

FORM OF TRANSFER OF CHARGE.

I, the within named A. B., in consideration of [five thousand pounds] paid to me, do transfer to C. D. the within mentioned mortgage.

Dated, &c.

(*Signature and seal.*)

Witness, &c.

FORM OF POWER OF ATTORNEY TO MAKE TRANSFERS.

I A. B. do appoint C. D. my attorney to transfer to E. F., absolutely [*or* by way of mortgage, *as the case may be,*] all my lands as entered and described in the Register of Estates under No. 129 and my estate therein.

(*Signed and sealed.*)

Witness,
A. B.,
Solicitor of the Court of Chancery,
or, a certificated conveyancer.

DECLARATION OF TITLE ACT.

25 & 26 VICT. CAP. 67.

An Act for obtaining a Declaration of Title.

[29*th July*, 1862.]

25 & 26 Vict. c. 67.

WHEREAS it is expedient to enable persons having interests in land to obtain in certain cases a judicial declaration of their title to the same, so as to enable them to make an indefeasible title to persons claiming under them as purchasers for a valuable consideration: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Parties claiming to be entitled to land may petition Court of Chancery for declaration of title.

I. Every person claiming to be entitled to land in possession for an estate in fee simple, either absolutely or subject to any incumbrances, estates, rights, or interests, vested or contingent, or claiming to have a power of disposing of land for his own benefit for an estate in fee simple in possession, either absolutely or subject to any incumbrances, estates, rights, or interests, vested or contingent, and every person entitled to apply for the registration of an indefeasible title to the Registrar appointed under any Act which may be passed in the present session for the registration of real estates and the title thereto, may apply to the Court of Chancery by petition in a summary way for a declaration of title under this Act.

Petition to set forth particulars affecting title.

II. Every such petition shall state what incumbrances, estates, rights, and interests, if any, the petitioner admits to affect his title, and subject to which he seeks to have his title declared, and shall be in such form as the Court shall by general order direct.

Two persons interested may jointly petition.

III. Any two or more persons claiming to have together such estate or interest in land as would have enabled any one person to petition as aforesaid may join in such a petition, and such proceedings shall be had thereupon as in the case of a single petitioner.

25 & 26 Vict. c. 67, s. 4.

IV. No such petition shall be admitted as to lands of copyhold or customary tenure.

Petition as to copyhold, &c. lands not admitted.

Court may require Registrar to be served with petition.

V. It shall be lawful for the Court, by general order or otherwise, if it shall think fit, to require that the Registrar who may be appointed under any Act passed during the present session for the registration of real estates and the title thereto shall be served with notice of such petition, and the Registrar shall thereupon be made a party to and attend the proceedings on such petition, and the costs thereby properly incurred shall be paid by the petitioner.

Court may investigate petitioner's title.

VI. The Court on the hearing of any such petition, on being satisfied that the petitioner has proved such a possession, and has stated such a title as, if established, would entitle him to a declaration under this Act, shall make an order for the investigation of the title in the same way as if the petitioner had obtained as vendor a decree for a specific performance of an agreement for sale of the land in question for the estate claimed in his petition.

If Court dissatisfied, petition to be dismissed, but subject to appeal.

VII. If the Court, on such investigation, shall not be satisfied that the petitioner has shown such a title as it would have compelled an unwilling purchaser to accept, then it shall dismiss the petition, but subject to the right of appeal hereinafter mentioned.

When investigation is satisfactory, Court may order a declaration of title to be made.

VIII. In case the Court is satisfied after such an investigation that the petitioner has shown such a title as it would have compelled an unwilling purchaser to accept, it shall, on the conditions hereinafter mentioned being complied with, make an order that on some day, not less than three months from the date of the order, a declaration shall be made establishing the petitioner's title, unless in the meantime cause is shown to the contrary; and the Court may enlarge the time for so showing cause as often as it may deem proper.

Order not to be made until security for costs is given.

IX. No such order shall be made until the petitioner shall have given security to the satisfaction of the Court for payment of all costs, if any, which may be awarded to any person who may oppose the petitioner's right to the declaration prayed for.

25 & 26 Vict. c. 67, s. 10.

Before order is made petitioner to file affidavit that all documents have been produced.

X. No such order shall be made until the petitioner and his solicitor, and any other person whom the Court may require, shall have made and filed an affidavit that to the best of their respective knowledge, information, and belief all settlements, deeds, documents, instruments, maps, plans, and papers relating to the title to the land in question have been produced to the Court, or the cause of their non-production has been fully and fairly explained, and that all facts material to the title have been fully and fairly disclosed to the Court: Provided always, that the Court may dispense with such affidavit either from the petitioner or his solicitor when it shall think it reasonable so to do, or may permit the same to be modified as circumstances may seem to require.

Notice of order to be advertised in newspapers.

XI. The petitioner after obtaining such order shall give notice of the same by advertisement in such newspapers and at such times as the Court may direct, and in any other manner which the Court may deem expedient for the purpose of informing all persons interested thereof, and as may be directed by any general or special order in that behalf.

Court may hear petition against declaration of title, or reserve rights.

XII. Any person may, at any time before the proposed declaration of title has been made, petition the Court in a summary way to be heard against the making thereof, and the Court shall thereupon fix a time for the hearing of such petition, and shall, if necessary, enlarge the time for making the declaration until such petition shall have been disposed of.

On hearing of petition Court may qualify or refuse declaration of title or reserve rights.

XIII. On the hearing of such petition the Court may introduce such restrictions or qualifications in the title sought to be declared as the justice of the case requires, or may reserve the rights of any person or class of persons, or may refuse to make any declaration of title.

Court may reserve rights of persons under lost deeds.

XIV. If it shall appear to the Court that all or any of the title deeds relating to the land in question have been lost or destroyed, the Court may, if it shall think fit, reserve the rights of all persons under any such lost or destroyed deeds.

25 & 26 Vict. c. 67, s. 15.

Where Court sees no reason for refusal, declaration of title to be made.

XV. If no petition has been presented against the proposed declaration of title within the time in that behalf limited, or if, having been presented, the Court shall be of opinion that no sufficient ground has been shown for refusing to make a declaration of title, then the Court shall, after the expiration of the time limited for showing cause, upon being satisfied that the required notices have been duly given, and that all other requisitions have been duly complied with, make a declaration that the original petitioner has such title to the land in question as he sought to establish by petition or such title, subject to any restrictions, reservations, or qualifications which it may deem necessary or proper to introduce.

Appeal may be made to Court of Appeal within six months after declaration.

XVI. Any person may, at any time within six months from the making of any such declaration, appeal therefrom to the Court of Appeal in Chancery; and such Court shall on the hearing of the appeal make an order confirming, varying, or annulling the declaration as it may see fit; but if there is no such appeal, then the said declaration shall, at the expiration of the said six months, become final for the purposes of this Act.

Parties may appeal from Court of Appeal to House of Lords.

XVII. Any person may appeal from any such order of the Court of Appeal to the House of Lords at any time within six months from the making thereof, and the said House may make an order confirming, varying, or annulling the said declaration as to them shall seem just; but if there is no such appeal, then the declaration, as approved by the said Court of Appeal in Chancery, shall at the expiration of the said six months become final for the purposes of this Act.

Declaration of title as approved by House of Lords to be final.

XVIII. In case of any such appeal as aforesaid to the House of Lords, the declaration of title as finally approved by them shall become final for the purposes of this Act.

Where Court refuses title, petitioner may appeal to Court of Appeal and House of Lords.

XIX. In case the Court shall have dismissed the original petition on the ground that the petitioner had not shown such a title as it would have compelled an unwilling purchaser to accept, or if, on the hearing of any petition against the making of the declaration of title

25 & 26 Vict. c. 67, s. 19.

prayed for, the Court shall have refused to make any declaration of title, the original petitioner shall have the same rights of appeal to the Court of Appeal in Chancery and to the House of Lords as is hereinbefore given to any person appealing against a declaration of title actually made.

Declaration of title not to be set aside for informality.

XX. The declaration of title, when it has in manner aforesaid become final for the purposes of this Act, shall not be set aside or called in question by reason of any irregularity or informality in the proceedings previous to the making thereof.

Declaration of title to be registered as an indefeasible title.

XXI. Every declaration of title made under this Act may, at the option of the person obtaining the same, be registered as an indefeasible title under any Act which may be passed in the present session of Parliament for the registration of real estates and the title thereto (*a*).

(*a*) See the Transfer of Land Act, p. 310, *ante*.

Certificate of Court to be given to party obtaining final declaration of title.

XXII. Any person who has obtained in manner aforesaid a final declaration of title shall be entitled to receive from the Court, on payment of the proper fees, and on production of his title deeds for the purpose next hereinafter mentioned, a certificate under the seal of the Court setting forth the title so declared, and further stating that the time for appealing has expired, and such certificate shall be conclusive evidence of the facts therein stated.

Production of deeds before sealing of certificate.

XXIII. Before any such certificate shall be sealed the petitioner shall produce to the Court such of his deeds and muniments of title as the Court shall require, and the same shall be stamped or marked by the officer issuing the certificate in such manner as the Court shall by general orders direct, for the purpose of showing that a declaration of title has been made as to the land therein comprised, or as to such part thereof as is comprised in the declaration.

Declaration of title to be deemed to have correctly declared land therein referred to.

XXIV. Such declaration of title, as soon as it shall have become final for the purposes of this Act, shall in favour of any person thereafter deriving title as a purchaser for valuable consideration of the land therein

referred to, or of any part thereof, or of any estate, right, or interest therein, by, from, through, or under the person whose title has been so declared, be deemed and taken to have correctly declared the same, but save as aforesaid such declaration shall have no force or effect whatever as to the title of the land comprised therein. 25 & 26 Vict. c. 67, s. 24.

XXV. Instead of a single declaration of title, or a single certificate, the Court may, on the application of the petitioner, make separate declarations, or give separate certificates as to the title of separate parts of the land referred to in the petition. Court may make separate declarations or certificates of title.

XXVI. If for the purpose of a sale or other disposition of the land comprised in any certificate of title, or of any part thereof, the holder of any such certificate shall be desirous of having separate certificates of title relating to separate portions of the land, it shall be lawful for the Court, on petition by such holder, to order his certificate to be cancelled, and in lieu thereof to give to him separate certificates for separate parts of the land comprised in the certificate so cancelled; and every such separate certificate shall refer to and state the date of the cancelled certificate, and shall have the same effect as to the land therein comprised as if it had been given at the time of such date, but no such substitution of certificates shall in any way prejudice or affect the title of any person who shall previously thereto have become entitled to any part of the land comprised in the original certificate, or any interest in the same. Court may cancel original certificate, and give certificates to separate parts of land comprised in cancelled certificate.

XXVII. Whenever any such substitution of certificates shall take place the land mentioned in every such separate certificate may be entered upon the register of estates with an indefeasible title, under any such Act for the registration of real estates and the title thereto as aforesaid; and in that case any transactions relating thereto shall, subject to any regulations to the contrary that may be made by general order, thenceforth form a separate record in the register, distinguished by a separate number, or in such other manner as the Registrar may determine. Substitution of certificates.

XXVIII. If any certificate of title shall be lost or certificate of

25 & 26 Vict. c. 67, s. 28.

destroyed, the Court may issue a fresh certificate in lieu of that so lost or destroyed, expressing on the face thereof that it is a duplicate, but no such fresh certificate shall be of any avail against any person who may have already derived title under the original certificate.

title is lost a duplicate may be issued.

Declaration of title not to affect certain claims, &c.

XXIX. The declaration of title shall not affect any of the claims, rights, or matters hereinafter mentioned, that is to say:

Land tax, succession duty, tithe rentcharge, rights of common, rents payable to the Crown, public rights of way, liability to repair highways by reason of tenure, rights of way, watercourses, rights of water and other easements, or servitudes, manorial rights and franchises, leases or agreements for leases for any term not exceeding twenty-one years where there is occupation under the same.

Registration of lands with declaration of indefeasible title.

XXX. From and after the registration of any land, as to which any such declaration of title as aforesaid shall have been made, in the hereinbefore mentioned register of estates with an indefeasible title, such land shall be subject to the provisions of any such Act for the registration of real estates and the title thereto as aforesaid, in the same manner as if the registration thereof had been made by virtue of proceedings duly taken under such last-mentioned Act.

Court may hear petition for recal or variation of declaration of title.

XXXI. If, at any time after any such declaration of title as aforesaid has been made, any person shall consider himself to be aggrieved thereby, it shall be lawful for him to present a petition praying that the same may be recalled or varied in such manner as may be just, and the Court shall thereupon proceed in the hearing of such petition in the same manner as if the same had been presented before the declaration of title had been made, and the Court may, on the hearing of the said petition, annul the declaration and order the certificate or certificates to be given up to be cancelled, or may make such variations therein as it may deem just, and may, if it shall think fit, also direct the registry thereof, if made, to be cancelled; but no proceeding on any such petition shall

prejudice or affect the title of any person who before any such annulling or variation shall have acquired a title under the said declaration as a purchaser for valuable consideration of the said land or of any estate or interest therein. 25 & 26 Vict. c. 67, s. 31.

XXXII. The Court may, on the hearing of any such last-mentioned petition, make any order which it may deem just, restraining the person who has obtained the declaration, and all persons claiming by, through, from, or under him otherwise than as a purchaser for valuable consideration, from in any manner dealing with the said land until such petition shall have been disposed of. For prevention of dealing with land until petition disposed of.

XXXIII. All proceedings on any such petition shall be liable to the same right of appeal as in the case of petitions presented before such declaration of title was made. Proceedings on petition liable to right of appeal.

XXXIV. The Court shall have power to order costs either as between party and party or as between solicitor and client to be paid by and to any person, party to any proceeding under this Act, and to give directions as to the fund out of which such costs shall be paid. Power to Court to order costs.

XXXV. And whereas it may happen that at the time of making such declaration of title as aforesaid there may be estates, rights, or interests in the land which may not be saved by the declaration, and the persons entitled to such estates, rights, or interests may be damnified by the subsequent alienation of the land for valuable consideration: Be it therefore enacted, that all money received by the person so alienating shall be deemed to have been received by him in trust to invest the same in the purchase of lands to be settled to the uses and on the trusts to and on which the lands so alienated stood limited at the time of such alienation: Provided always, that this clause shall not be deemed to impose any liability on any person who may have received any money on such alienation as a trustee, so far as relates to money which he may have duly applied in execution of the trusts reposed in him. Person alienating to invest trust money in purchase of lands to be settled to certain uses.

XXXVI. Where any married woman is desirous of making any application, giving any consent, or doing any Provision as to married women.

25 & 26 Vict. c. 67, s. 36.

act, or becoming party to any proceeding under this Act, her husband's concurrence shall be required, and she shall be examined apart from her husband touching her knowledge of the nature and effect of the application or other act, and it shall be ascertained that she is acting freely and voluntarily; and such examination may be taken by the Court or such persons as are authorised to take acknowledgments of deeds by married women under the Act of the session holden in the third and fourth years of King William the Fourth, chapter seventy-four, "for the abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance;" and the form and manner in which such examination shall be certified to the Court shall be determined by the general rules and orders to be made under this Act: Provided always, that a married woman entitled to her separate use, and not restrained from anticipation, shall for the purposes of this Act be deemed a feme sole.

3 & 4 Wm. 4, c. 74.

Provision for other persons under disability.

XXXVII. Where any person who (if not under disability) might have made any application, given any consent, done any act, or been party to any proceeding under this Act, is a minor, idiot, or lunatic, the guardian or committee of the estate respectively of such person may make such applications, give such consents, do such acts, and be party to such proceedings, as such person respectively, if free from disability, might have made, given, done, or been party to, and shall otherwise represent such person for the purposes of this Act: Provided always, that where there is no guardian or committee of the estate of any such person as aforesaid, being infant, idiot, or lunatic, or where any person the committee of whose estates if he were idiot or lunatic would be authorised to act for and represent such person under this Act is of unsound mind or incapable of managing his affairs, but has not been found idiot or lunatic under an inquisition, it shall be lawful for the Court to appoint a guardian of such person for the purpose of any proceedings under this Act, and from time to time to change such guardian.

25 & 26 Vict. c. 67, s. 38.

Proceedings not to abate by death, &c.

XXXVIII. Proceedings under this Act shall not abate or be suspended by any death or transmission or change of interest, but in any such case of death or transmission or change of interest it shall be lawful for the Court, where it sees fit, to require notices to be given to persons becoming interested, or to make any order for discontinuing, suspending, or carrying on the proceedings, or otherwise in relation thereto, which to the Court may appear just.

Register of estates, titles, &c., to be kept.

XXXIX. A register shall be kept in such place as the Lord Chancellor shall appoint, wherein any person having or claiming to have any estate, right, title, or interest in or to any land, or having or claiming to have any incumbrance thereon, shall be at liberty to enter his name and address, with the name of the county, parish, and township in which such land is situated, in such form as the Chancellor shall order; and when any person shall have made such entry the Court shall not make an order under this Act unless it is satisfied, after such evidence as it shall think sufficient, that notice of the application for such order has been given to such person as shall have made such entry in a reasonable time before such order is actually made.

Power to Lord Chancellor, &c., to make rules and orders.

XL. The Lord Chancellor, with the advice and assistance of the Master of the Rolls, the Lords Justices of the Court of Appeal in Chancery, and the Vice-Chancellors, or of any three of them, shall from time to time make such general rules and orders as he may see fit for carrying the purposes of this Act into effect, and for regulating the times and form and mode of procedure, and of giving notices, and generally the practice of the Court in respect of the matters to which this Act relates; and such rules and orders may from time to time be rescinded or altered by the like authorities respectively; and all such rules and orders shall take effect as general orders of the Court.

Court of Chancery to adopt rules in schedule until

XLI. Until any general rules and orders shall be framed under the last preceding section, the rules and orders set forth in the schedule hereto annexed shall be

25 & 26 Vict. c. 67, s. 41.

general rules are framed.

taken to be rules and orders of the Court of Chancery, but the same shall be liable to be rescinded or altered as if they had been made by the Lord Chancellor, with such advice and assistance as in the last preceding section is mentioned.

Power to Lord Chancellor to appoint additional clerks.

XLII. It shall be lawful for the Lord Chancellor from time to time to appoint such additional clerks as to him may seem necessary for enabling the Court duly to execute the duties imposed on it; and every such additional clerk shall receive out of the Suitors' Fee Fund such salary as the Lord Chancellor, with the consent of the Lords of the Treasury, may think proper.

Rules and orders to be laid before Parliament.

XLIII. All general rules and orders made as aforesaid, including all orders for the appointment of any additional clerks, shall, immediately after the making and issuing thereof, be laid before both Houses of Parliament, if Parliament be then sitting, or if Parliament be not then sitting, within twenty-one days after the next meeting thereof; and it shall be lawful for either House of Parliament, by any resolution passed within six weeks after such rules or orders have been laid before it, to resolve that the same or any part thereof ought not to continue in force, and thereupon the same shall cease to be binding.

Penalty on making false statement and suppression of deeds and evidence.

XLIV. If in the course of any proceeding before the Court under this Act any person acting either as principal or agent shall, knowingly and with intent to deceive, make or assist or join in or be privy to the making of any material false statement or representation, or suppress, conceal, or assist or join in or be privy to the suppressing, withholding, or concealing from the Court any material document, fact, or matter of information, every person so acting shall be deemed to be guilty of a misdemeanor, and on conviction shall be liable to be imprisoned for a term not exceeding three years, and either with or without hard labour, or to be fined such sum as the Court by which he is convicted shall award: the order or declaration of title obtained by means of such fraud or falsehood shall be null and void for or against all persons

other than a purchaser for valuable consideration without notice. 25 & 26 Vict. c. 67, s. 44.

[By sect. 45, any person forging any land certificate, &c., is to be guilty of *felony*, and punishable accordingly.]

XLVI. No proceeding or conviction for any act hereby declared to be a misdemeanor shall affect any remedy which any person aggrieved by such act may be entitled to, either at law or in equity, against the person who has committed such act. Conviction not to affect civil remedy.

XLVII. Nothing in this Act contained shall entitle any person to refuse to make a complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding, in any court of law or equity, or in the Court of Bankruptcy; but no answer to any such bill, question, or interrogatory shall be admissible in evidence against such person in any criminal proceeding. Enactment of penalty not to exclude obligation to make discovery.

XLVIII. In the construction of this Act (except where the context or other provisions of the Act require a different construction) the word "person" shall include a body politic or corporate; the word "possession" shall include receipt of the rents and profits; and the word "land" shall not include any incorporeal hereditaments, but shall include all corporeal tenements and hereditaments not expressly excepted. Construction of terms, &c., in this Act: "Person:" "Possession:" "Land."

XLIX. This Act shall relate to England only, and shall come into operation on the first day of January, one thousand eight hundred and sixty-three, and may be cited as "The Declaration of Title Act, 1862." Extent of Act. Short title.

SCHEDULE.

1. Every petition for a declaration of title shall contain an exact description in their actual state of the lands as to which the declaration is sought, stating particularly the boundaries thereof, and the lands on which the same and every part thereof abut, and so far as conveniently may be, the names and descriptions of the owners and occupiers of such last mentioned lands.

2. On the investigation of the title to the lands as to

25 & 26 Vict. c. 67.

which the declaration is sought, the identity of the lands described in the petition, with the parcels as described in the title deeds, shall be established by affidavit or otherwise, as the Court may deem just.

3. The Court may, if it shall deem it necessary or proper, require the petitioner to lodge in court a map or plan of the lands in question.

4. The petitioner, after obtaining the order for a declaration of title, shall cause a copy thereof, together with the description of the lands in question, with any engraved or lithographed plan thereof (if any exists) to be served on every adjoining occupier and owner, or on such of them and on such other persons (if any) as the Court may direct to be so served.

5. He shall also cause a copy or copies thereof to be deposited in some office or place, offices or places, to be appointed by the Court on or near to the lands in question, to be accessible at all reasonable times to all persons desirous of examining the same, and notice of every such deposit shall be affixed in some public place or places on or near to the lands in question.

6. Every such copy served on any adjoining occupier or owner, or deposited as aforesaid, shall state that any person wishing to show cause against the making of the proposed declaration may do so by presenting a petition in a summary way to the Court of Chancery at any time before the day appointed for making the proposed declaration.

7. The petitioner, after such deposit shall have been made, shall cause advertisements to be inserted three times at least in such newspapers on such days as the Court shall direct, stating the said order, and stating also where any copy has been so deposited for inspection.

8. Unless the last of such advertisements is made within four weeks next after the date of the order, the time thereby fixed for showing cause against the same shall be enlarged for one calendar month, or such further time as the Court shall direct.

CONFIRMATION OF SALES ACT.

25 & 26 VICT. CAP. 108.

[See *ante*, p. 259.]

JUDGMENT ACT, 1864.

27 & 28 VICT. CAP. 112.

An Act to amend the Law relating to future Judgments, Statutes, and Recognizances. [29*th July*, 1864.

27 & 28 Vict. c. 112.

WHEREAS it is desirable to assimilate the law affecting freehold, copyhold, and leasehold estates to that affecting purely personal estates in respect of future judgments, statutes, and recognizances: Therefore be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Future judgments, &c., not to affect land until land delivered in execution.

I. No judgment, statute, or recognizance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment, statute, or recognizance (*a*).

(*a*) See *Thornton* v. *Finch*, 4 Giff. 505.

Purchasers, &c., without notice.

By 1 & 2 Vict. c. 110, s. 13 (*ante*, p. 2) the rights of purchasers, &c., *without notice*, were saved, even though the judgments were properly registered; but this section, like sect. 1 of 23 & 24 Vict. c. 38, *ante*, p. 286, contains no such provision; it seems, therefore, that whether the purchaser or mortgagee have notice or not, he will, if the requisitions of the Act have been complied with, be bound.

Judgments have priority in *administration*, if the *executors have notice* of them, whether the requisitions of the Act have or have not been complied with, *Jemmings* v. *Rigby*, cited in note (*e*), p. 288.

See as to the effect of the different Judgment Acts, note (*a*), p. 3, *ante*, and notes to 23 & 24 Vict. c. 38, s. 1, *ante*, p. 287.

Interpretation of terms.

II. In the construction of this Act the term "judgment" shall be taken to include registered decrees, orders of Courts of Equity and Bankruptcy, and other orders having the operation of a judgment; and the term "land" shall be taken to include all hereditaments, corporeal or incorporeal, or any interest therein; and the term "debtor" shall be taken to include husbands of married women,

27 & 28 Vict. c. 112, s. 2.

assignees of bankrupts, committees of lunatics, and the heirs or devisees of deceased persons.

Writs of execution to be registered in manner prescribed by 23 & 24 Vict. c. 38.

III. Every writ or other process of execution of any such judgment, statute, or recognizance, by virtue whereof any land shall have been actually delivered in execution, shall be registered in the manner provided by an Act passed in the session of the twenty-third and twenty-fourth years of Her present Majesty, intituled "An Act to further amend the Law of Property," but in the name of the debtor against whom such writ or process is issued, instead of, as under the said Act, in the name of the creditor (*b*); and no other or prior registration of such judgment, statute, or recognizance shall be or be deemed necessary for any purpose; and no reference to any such prior registration shall be required to be made in or by the memorandum or minute of such writ or other process of execution which shall be left with the Senior Master of the Court of Common Pleas for the purpose of such registry.

(*b*) See *ante*, p. 287, note (*d*).

Creditor to whom land delivered in execution entitled to obtain summary order from Court of Chancery for sale.

IV. Every creditor to whom any land of his debtor shall have been actually delivered in execution by virtue of any such judgment, statute, or recognizance, and whose writ or other process of execution shall be duly registered, shall be entitled forthwith, or at any time afterwards while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery, upon petition in a summary way, an order for the sale (*c*) of his debtor's interest in such land, and every such petition may be served upon the debtor only; and thereupon the Court shall direct all such inquiries to be made as to the nature and particulars of the debtor's interest in such land, and his title thereto, as shall appear to be necessary or proper; and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the said court with respect to sales of real estates of deceased persons for the payment of debts shall be adopted and followed, so far as the same may be found conveniently applicable (*d*).

(*c*) The section applies only to judgments entered up before the passing of the Act, 29 July, 1164, *Re Isle of Wight Ferry Company*, 34 L. J. Ch. 194. 27 & 28 Vict. c. 112, s. 4.

A railway company's lands may be ordered to be sold under the section, *Re Bishop's Waltham Railway Company*, 14 W. R. 1008; but the Court will not order a sale if the debtor's interest is not of a saleable nature, but will direct inquiries, s. c. 2 L. R. Ch. 382; *Gardner* v. *London, Chatham, and Dover Railway Company*, *ibid.* 485; and see now 30 & 31 Vict. c. 127 (pp. 359—359 (H) *post*), protecting the rolling stock and plant of railways from execution, and authorising railway companies, who are unable to meet their engagements, to file schemes of arrangement, and after filing such scheme to apply for stay of actions, suits, and executions. Sale at instance of judgment creditor. Railway Companies Act, 1867.

(*d*) For form of inquiries in the case of lands belonging to a railway company, see *ibid.*, and *Re Hull and Hornsea Railway Company*, 2 L. R. Eq. 362; and *Re Ventnor Harbour Company*, 13 L. T. N. S. 793; and for form of inquiries in ordinary cases, see *Ex parte Clark*, 6 N. R. 335, and compare Seton, 455. Form of inquiry.

V. If it shall appear on making such inquiries that any other debt due on any judgment, statute, or recognizance is a charge on such land, the creditor entitled to the benefit of such charge (whether prior or subsequent to the charge of the petitioner) shall be served with notice of the said order for sale, and shall after such service be bound thereby, and shall be at liberty to attend the proceedings under the same, and to have the benefit thereof; and the proceeds of such sale shall be distributed among the persons who may be found entitled thereto, according to their respective priorities. Where there are other creditors, notice of sale to be served upon them.

VI. Every person claiming any interest in such land through or under the debtor, by any means subsequent to the delivery of such land in execution as aforesaid, shall be bound by every such order for sale, and by all the proceedings consequent thereon. Parties claiming interest through debtor bound by order for sale.

VII. This Act shall not extend to Ireland. Extent of Act.

MORTGAGE DEBENTURE ACT, 1865.

28 & 29 Vict. c. 78.

28 & 29 VICT. CAP. 78.

[See note, p. 147, *ante*, head (8).]

COUNTY COURTS EQUITABLE JURISDICTION ACT.

28 & 29 Vict. c. 99.

28 & 29 VICT. CAP. 99.

[See Appendix, p. lxxxviii, *post.*]

30 & 31 Vict. c. 44.

CHANCERY (IRELAND) ACT, 1867.

30 and 31 VICT. CAP. 44.

[See Tabular Analysis of this Act, in pp. xxvi. and xxvii. of Prefatory Matter, *ante*.]

30 & 31 Vict. c. 48.

SALE OF LAND BY AUCTION ACT.

30 & 31 VICT. CAP. 48.

[See ss. 7—9, quoted p. 156, *ante*.]

30 & 31 Vict. c. 64.

COURT OF APPEAL IN CHANCERY AMENDMENT ACT.

30 & 31 VICT. CAP. 64.

An Act to make further Provision for the Despatch of Business in the Court of Appeal in Chancery.

[25*th July*, 1867.

14 & 15 Vict. c. 83.

WHEREAS it is expedient to make further provision for the despatch of business in the Court of Appeal in Chancery constituted by the Act fourteenth and fifteenth Victoria, chapter eighty-three (*a*):

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Jurisdiction, &c., of Court of Appeal may be exercised by one judge, except, &c.

I. All the jurisdiction, powers, and authorities of the said Court of Appeal under the said recited Act or under any other Act, may (except as hereinafter mentioned), be exercised either by both of the judges appointed under the said Act when sitting together, or by either of the said judges when sitting separately, or by the Lord Chancellor when sitting with the said judges or either of them; provided that no decree made on the *hearing of a cause* (*b*) *or on further consideration*, shall be re-heard before the said judges when sitting separately: Provided also, that the Lord Chancellor shall and may, while sitting alone, have and exercise the like jurisdiction, powers, and authorities as might have been exercised by the Lord Chancellor if this Act had not been passed.

(*a*) See p. 136, *ante*, and particularly sect. 11, of the Act, p. 139, *ante*.

(*b*) The present Lords Justices have decided with reference to their separate sittings under this Act, after consultation with the Lord Chancellor, that the Act, in excepting the hearing of decrees made on the hearing of a cause, enables a rehearing of a decree made on *motion for decree*, to take place before any member of the Court.—11 Solicitor's Journal, 915.

30 & 31 Vict. c. 64, s. 1.

Separate sittings of Lords Justices.

By sect. 13 of 30 & 31 Vict. c. 87 (the Court of Chancery (Officers) Act, 1867), "All the Jurisdiction, Powers, Authorities, and Duties of the Lords Justices of the Court of Appeal in Chancery under the Lunacy Regulation Act, 1853, or under any other Act, as being intrusted by virtue of the Queen's Sign Manual with the Care and Commitment of the Custody of the Persons and Estates of Persons found idiot, lunatic, or of unsound Mind, may be exercised and performed not only by both of the Lords Justices jointly acting or sitting together, but also by either of them alone acting or sitting separately."

Jurisdiction in lunacy to be exercised by the Lords Justices sitting separately.

II. The Lord Chancellor shall from time to time fix the times at which the judges of the Court of Appeal appointed under the said Act, or either of them, shall sit with the Lord Chancellor, and at which the said judges shall sit together or separately; and also what appeals, motions, petitions, and other matters shall be heard and determined by the full Court, and by the said judges sitting together or separately, and by the Lord Chancellor sitting alone or with either of the said judges.

Lord Chancellor to fix times of sitting.

III. This Act and the said recited Act shall be read together as one Act.

Recited Act and this Act to be as one.

COURT OF CHANCERY (OFFICERS) ACT.

30 & 31 Vict. c. 87.

30 & 31 VICT. CAP. 87.

[For ss. 1—8 of this Act, see p. 145, *ante*.

For s. 11 (as to cheques in the Accountant-General's office), see note (*a*), p. 366, *post*.

For s. 13, see note (*b*), *supra*.]

RAILWAY COMPANIES ACT (1867).

30 & 31 Vict. c. 127, s. 1.

30 & 31 VICT. CAP. 127.

An Act to amend the Law relating to Railway Companies.

[20*th August*, 1867.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

I. This Act may be cited as The Railway Companies Act, 1867.

Short title.

30 & 31 Vict. c. 127, s. 2.

Extent of Act.

II. Except as in this Act expressly otherwise provided, this Act shall not extend to Scotland.

Interpretation of terms.

III. In this Act—

The term "company" means a railway company; that is to say, a company constituted by Act of Parliament, or by certificate under Act of Parliament, for the purpose of constructing, maintaining, or working a railway (either alone or in conjunction with any other purpose):

The term "action" includes suit or other proceeding:

The term "judgment" includes decree, order, or rule:

The term "share" includes stock:

The term "person" includes corporation:

The term "Court of Chancery" or "Court" means the Court of Chancery in England or Ireland, as the case requires:

The term "Gazette" means, with respect to England, the "London Gazette," and with respect to Ireland the "Dublin Gazette."

Protection of Rolling Stock and Plant.

Restriction on execution against personal property of company.

IV. The engines, tenders, carriages, trucks, machinery, tools, fittings, materials, and effects, constituting the rolling stock and plant used or provided by a company for the purposes of the traffic on their railway, or of their stations or workshops, shall not, after their railway or any part thereof is open for public traffic, be liable to be taken in execution at law or in equity at any time after the passing of this Act, and before the first day of September, one thousand eight hundred and sixty-eight, where the judgment on which execution issues is recovered in an action on a contract entered into after the passing of this Act, or in an action not on a contract commenced after the passing of this Act; but the person who has recovered any such judgment may obtain the appointment of a receiver, and, if necessary, of a manager, of the undertaking of the company, on application by petition in a summary way to

the Court of Chancery in England or in Ireland, according to the situation of the railway of the company; and all money received by such receiver or manager shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the company and otherwise according to the rights and priorities of the persons for the time being interested therein; and on payment of the amount due to every such judgment creditor as aforesaid the Court may, if it think fit, discharge such receiver or such receiver and manager. 30 & 31 Vict. c. 127, s. 4.

V. If in any case where property of a company has been taken in execution a question arises whether or not it is liable to be so taken notwithstanding this Act, the same may be heard and determined on an application by either party by summons in a summary way to the court out of which the execution issued, or if the court is one of the superior courts of law, then to a judge of any one of those courts, and such determination shall be final and binding. Determination of questions respecting executions.

Arrangements.

VI. Where a company are unable to meet their engagements with their creditors the directors may prepare a scheme of arrangement between the company and their creditors (with or without provisions for settling and defining any rights of shareholders of the company as among themselves, and for raising, if necessary, additional share and loan capital, or either of them), and may file the same in the Court of Chancery in England or in Ireland, according to the situation of the principal office of the company, with a declaration in writing under the common seal of the company to the effect that the company are unable to meet their engagements with their creditors, and with an affidavit of the truth of such declaration made by the chairman of the board of directors and by the other directors, or the major part in number of them, to the best of their respective judgment and belief. Preparation and filing of scheme of arrangement.

VII. After the filing of the scheme, the Court may, on Stay of actions.

30 & 31 Vict. c. 127, s. 7.

the application of the company on summons or motion in a summary way, restrain any action against the company on such terms as the Court thinks fit.

Notice in "Gazette."

VIII. Notice of the filing of the scheme shall be published in the Gazette.

Stay of executions, &c.

IX. After such publication of notice no execution, attachment, or other process against the property of the company shall be available without leave of the Court, to be obtained on summons or motion in a summary way.

Assent by mortgagees, &c.

X. The scheme shall be deemed to be assented to by the holders of mortgages or bonds issued under the authority of the company's special Acts when it is assented to in writing by three-fourths in value of the holders of such mortgages or bonds, and shall be deemed to be assented to by the holders of debenture stock of the company when it is assented to in writing by three-fourths in value of the holders of such stock.

Assent by holders of rentcharge, &c.

XI. Where any rentcharge or other payment is charged on receipts of or is payable by the company in consideration of the purchase of the undertaking of another company, the scheme shall be deemed to be assented to by the holders of such rentcharge or other payment when it is assented to in writing by three-fourths in value of such holders.

Assent by preference shareholders.

XII. The scheme shall be deemed to be assented to by the guaranteed or preference shareholders of the company when it is assented to in writing as follows:—If there is only one class of guaranteed or preference shareholders, then by three-fourths in value of that class, and if there are more classes of guaranteed or preference shareholders than one, then by three-fourths in value of each such class.

Assent by ordinary shareholders.

XIII. The scheme shall be deemed to be assented to by the ordinary shareholders of the company when it is assented to at an extraordinary general meeting of the company specially called for that purpose.

Assent by leasing company.

XIV. Where the company are lessees of a railway the scheme shall be deemed to be assented to by the leasing company when it is assented to as follows:—

In writing by three-fourths in value of the holders of mortgages, bonds, and debenture stock of the leasing company: 30 & 31 Vict. c. 127, s. 14.

If there is only one class of guaranteed or preference shareholders of the leasing company, then in writing by three-fourths in value of that class, and if there are more classes of guaranteed or preference shareholders in the leasing company than one, then in writing by three-fourths in value of each such class:

By the ordinary shareholders of the leasing company at an extraordinary general meeting of that company specially called for that purpose.

XV. Provided that the assent to the scheme of any class of holders of mortgages, bonds, or debenture stock, or of any class of holders of a rentcharge or other payment as aforesaid, or of any class of guaranteed or preference shareholders, or of a leasing company, shall not be requisite in case the scheme does not prejudicially affect any right or interest of such class or company. Assent of creditors, &c., not affected, unnecessary.

XVI. If at any time within three months after the filing of the scheme, or within such extended time as the Court from time to time thinks fit to allow, the directors of the company consider the scheme to be assented to as by this Act required, they may apply to the Court by petition in a summary way for confirmation of the scheme. Application for confirmation of scheme.

Notice of any such application, when intended, shall be published in the Gazette.

XVII. After hearing the directors, and any creditors, shareholders, or other parties whom the Court thinks entitled to be heard on the application, the Court, if satisfied that the scheme has been within three months after the filing of it, or such extended time (if any) as the Court has allowed, assented to as required by this Act, and that no sufficient objection to the scheme has been established, may confirm the scheme. Confirmation of scheme.

XVIII. The scheme when confirmed shall be enrolled in the court, and thenceforth the same shall be binding and effectual to all intents, and the provisions thereof Enrolment and effect of scheme.

30 & 31 Vict. c. 127, s. 18.

shall, against and in favour of the company and all parties assenting thereto or bound thereby, have the like effect as if they had been enacted by parliament.

Notice of confirmation of scheme.

XIX. Notice of the confirmation and enrolment of the scheme shall be published in the Gazette.

Company to keep printed copies of scheme for sale.

XX. The company shall at all times keep at their principal office printed copies of the scheme, when confirmed and enrolled, and shall sell such copies to all persons desiring to buy the same at a reasonable price, not exceeding sixpence for each copy.

Penalty for neglect.

If the company fail to comply with this provision they shall be liable to a penalty not exceeding twenty pounds, and to a further penalty not exceeding five pounds for every day during which such failure continues after the first penalty is incurred, which penalties shall be recovered and applied as penalties under "The Railways Clauses Consolidation Act, 1845," are recoverable and applicable.

Provision for cases where railways or part in Scotland.

XXI. Where a company whose principal office is situate in England have a railway or part of a railway in Scotland the following provisions shall have effect:

(1.) Any scheme under this Act shall be filed in the Court of Chancery in England:

(2.) Where, after the filing of the scheme, any person who is not amenable to the jurisdiction of the Court of Chancery in England brings any action against the company in Scotland, the Court of Session may, on the application of the company by petition in a summary way, sist, stay, or interdict the same on such terms as the Court thinks fit:

(3.) Notice of the filing of the scheme shall be published in the "Edinburgh Gazette," and after such publication no diligence against the property of the company in Scotland shall be available for any person who is not amenable to the jurisdiction of the Court of Chancery in England without the leave of the Court of Session, to be obtained on petition in a summary way:

In this section the term "Court of Session" means either division of the Court of Session, or in time of vacation the Lord Ordinary officiating on the Bills. 30 & 31 Vict. c. 127, s. 21.

General orders for regulation of practice in Court of Chancery.

XXII. The Lord Chancellor of Great Britain, with the advice and assistance of the lords justices of the Court of Appeal in Chancery, the Master of the Rolls, and the vice-chancellors, or any two of those judges, and the Lord Chancellor of Ireland, with the advice and assistance of the Lord Justice of Appeal in Chancery and the Master of the Rolls, or one of them, may from time to time make general orders for the regulation of the practice of the Courts of Chancery in England and Ireland respectively under this Act.

Loan Capital.

Priority of mortgages.

XXIII. All money borrowed or to be borrowed by a company on mortgage or bond or debenture stock under the provisions of any Act authorising the borrowing thereof shall have priority against the company and the property from time to time of the company over all other claims on account of any debts incurred or engagements entered into by them after the passing of this Act: Provided always, that this priority shall not affect any claim against the company in respect of any rentcharge granted or to be granted by them in pursuance of "The Lands Clauses Consolidation Act, 1845," or "The Lands Clauses Consolidation Acts Amendment Act, 1860," or in respect of any rent or sum reserved by or payable under any lease granted or made to the company by any person in pursuance of any Act relating to the company which is entitled to rank in priority to, or *pari passu* with, the interest or dividends on the mortgages, bonds, and debenture stock; nor shall anything hereinbefore contained affect any claim for land taken, used, or occupied by the company for the purposes of the railway, or injuriously affected by the construction thereof, or by the exercise of any powers conferred on the company.

20 & 31 Vict. c. 127, ss. 24—35.

[Sections 24—26 relate to the issue of railway debenture stock, subject to the provisions of the Companies Clauses Act, 1863. By sections 27—29, railway companies may issue shares or stock at a discount. Section 30 relates to the audit of railway accounts; and sections 31—35 to the abandonment of railways under stat. 13 & 14 Vict. c. 83.]

Purchase of Lands.

Amendment (as to railway companies) of s. 85 of 8 & 9 Vict. c. 18.

XXXVI. Where after the passing of this Act a company exercise the powers conferred on the promoters of the undertaking by section eighty-five of the Lands Clauses Consolidation Act, 1845 (*a*), the following provisions shall have effect:

(1.) The surveyor to be appointed as in that section provided shall be appointed by the Board of Trade instead of by two justices, and all the provisions of that Act relative to a surveyor appointed by two justices shall apply to a surveyor so appointed by the Board of Trade:

(2.) The company shall give not less than seven days' notice of their intention to apply to the Board of Trade for the appointment of a surveyor to any party interested in or entitled to sell and convey the lands in question, and not consenting to the entry of the company:

(3.) The valuation to be made by the surveyor so appointed shall include the amount of compensation for all damage and injury to be sustained by reason of the exercise of the powers conferred by the said section, as far as such damage and injury are capable of estimation:

(4.) The sureties to the bond to be given by the company under that section shall, in case the parties differ, instead of being approved of by two justices, be approved of by the Board of Trade, after hearing the parties.

(*a*) See p. 55, *ante*.

Costs of arbitrations as to lands.

XXXVII. Where, in England, under the Lands Clauses Consolidation Act, 1845, or any Act incorporating the same, a question of disputed compensation relating to lands

required to be purchased or taken by a company is determined by arbitration, the costs of and incidental to the arbitration and award shall, if either party so requires, be settled, as between the parties, by one of the Masters of the Court of Queen's Bench. 30 & 31 Vict. c. 127, s. 37.

TRUSTEES INVESTMENTS ACT, 1867.

30 & 31 Vict. c. 132.

30 & 31 VICT. CAP. 132.

[See notes (*s*) and (*t*), p. 285, *ante*.]

COUNTY COURTS AMENDMENT ACT, 1867.

30 & 31 Vict. c. 142.

30 & 31 VICT. CAP. 142.

[See Appendix, p. xciv. *post*.]

END OF PART I.

PART II.

CONSOLIDATED GENERAL ORDERS

OF THE

COURT OF CHANCERY,

AND

ORDERS MADE SUBSEQUENTLY TO THE PROMULGATION OF THE CONSOLIDATED ORDERS.

PRELIMINARY ORDER.

The Right Honorable Lord John Campbell, Lord High Chancellor of Great Britain, by and with the advice and assistance of The Right Honorable Sir John Romilly, Master of the Rolls, The Right Honorable the Lord Justice Sir James Lewis Knight Bruce, The Right Honorable the Lord Justice Sir George James Turner, The Honorable the Vice-Chancellor Sir Richard Torin Kindersley, The Honorable the Vice-Chancellor Sir John Stuart, and The Honorable the Vice-Chancellor Sir William Page Wood, Doth hereby, in pursuance and execution of all powers and authorities enabling him in that behalf, order and direct in manner following:—

Rule 1. Prior orders abrogated.

1 (*a*). From and after the fourteenth day of February, 1860, all the General Orders of the High Court of Chancery which have been at any time heretofore made, shall be abrogated; and in lieu thereof, the Orders hereinafter expressed shall constitute the General Orders of the said Court; except that—

Exceptions. Article (1). Orders as to the Masters, &c., to continue in force.

(1.) All the Orders now in force relating to or connected with the Masters in Ordinary of the said Court, or their reports, or the business of their offices, or the further proceedings upon their reports, unless otherwise regulated by the now existing practice, shall, so far as

such Orders relate thereto, continue in full force until the same shall be otherwise abrogated, or until the business of the offices of the said Masters shall be finally closed, and the matters arising thereon wound up and determined, when all such Orders shall thereupon become *ipso facto* totally abrogated. Prelim. Ord.

(*a*) The Consolidated Orders date from Feb. 15, 1860. See rule 9, p. 364, *post*. Feb. 15, 1860.

"Each paragraph to which an arabic numeral, not inclosed in parenthetic marks, is prefixed, is designated a *Rule*, and each paragraph of a Rule to which an arabic numeral, inclosed in parenthetic marks, is prefixed, is designated an *Article*." Note (*a*) to authorised edition. Rules. Articles.

Care has been taken to point out the variations between the old Orders and the corresponding Orders into which they have been incorporated, wherever such variation is material, and in particular, wherever any case has been decided upon the old Order, which is inapplicable, or only partially applicable, to the new Order. Where, on the other hand, the variation is purely verbal, or is the result of some general alteration in the practice, *ex. gr.* where the Judge in chambers is substituted for the Master, the variation is not noticed. Variations between old orders and consolidated Orders.

For the convenience of practitioners it should be mentioned that *where a Rule is entirely new, or contains important new matter*, it is prefixed with an asterisk. This course has been partially adopted by the consolidators in the authorised edition.

The Court has power to dispense with the strict requirements of the general orders, where justice requires, *Smith* v. *Baker*, 2 H. & M. 498 ; *Ferrand* v. *Mayor of Bradford*, 8 D. M. G. 93 ; *Betts* v. *De Vitre*, 15 W. R. 701. Power to dispense with rules.

As to the power of the Lord Chancellor to make general Orders for carrying into effect the 15 & 16 Vict. c. 86, see, *ante*, p. 225, and note (*k*). And as to the validity of Orders made under that Act, but relating not merely to the practice under the Act, but to other matters, *e. g.* allowing interest on debts, see note (*i*) to Ord. XLII. 9, *post*. Power to make rules.

And as to the statutory authority of such of the Orders as were made in pursuance of the 3 & 4 Vict. c. 94, and 4 & 5 Vict. c. 52 (including the Orders for serving a defendant out of the jurisdiction, and entering an appearance for him), see *Drummond* v. *Drummond*, 2 L. R. Ch. 32, 43. 3 & 4 Vict. c. 94.

(2.) The Orders of the 5th of May, 1837, so far as regards suits or matters commenced or originated before the 20th of May, 1837, and the 4th Order of the 11th of November, 1841, so far as regards suits or matters commenced or originated before that day, shall, as respects the ascertainment or selection of the Court to which such causes or matters are or ought to be attached, remain unaffected by the abrogation hereinbefore made. Article (2). Orders of 5 May, 1837, and 11 November, 1841, as to selection of court in the case of old suits unaffected.

(3.) The abrogation aforesaid shall not extend to or affect any of the following Orders :— Article (3). Other Orders unaffected.

The Orders relating to the Suitors' Fund, or the Suitors' Fee Fund, or the Solicitor to the Suitors' Fund.

Prelim. Ord.

The Orders of the 26th of May and 4th of November, 1725 (as to the custody of suitors' money and effects), which are recited in the statute 12 Geo. I. c. 32.

And the *Orders* (*b*) of the 1st of August, 1741, and the 28th of August, 1828 (as to Exchequer Orders and Bills),—the Order of the 1st of November, 1841 (as to Exchequer Powers of Attorney),—the *Order* (*b*) of the 8th July, 1842 (as to Income Tax), —the *Order* (*b*) of the 27th of July, 1852 (as to certain office routine), and the *Orders* (*b*) of the 4th of March, 1846 (as to the drainage of settled estates).

Article (4). Orders as to fees not provided for by regulations.

(4.) So far as any Order relates to any fee now payable in any office, or to any officer, of the said Court, and no provision is made by the Regulations subjoined to these Orders as to fees in such office, or to such officer, such Order shall not be affected by the abrogation aforesaid.

Article (5). Old Orders as to fees incurred before Feb. 1, 1857.

(5.) So far as any Order made before the 30th of January, 1857, and then in force, relates to Court fees or Solicitors' fees, such Order shall continue in force, for the purpose only of regulating Court fees and Solicitors' fees incurred before the 1st of February, 1857.

Article (6). Orders of a personal or temporary character.

(6.) Orders of a merely personal or temporary character shall not be affected by the abrogation aforesaid.

Article (7). Orders relating exclusively to the common law side of Court.

(7.) Orders relating exclusively to the common law side of the Court shall not be hereby affected.

Rule 2. Regulations not affected.

2. The abrogation hereinbefore made shall not be deemed to extend to any rules put forth by the authority of the judges of the said Court, not purporting to be General Orders, but purporting to be mere Regulations (*c*).

Orders not abrogated.

(*b*) These Orders have been hitherto printed in the Appendix, but being practically obsolete are omitted in this edition. For the Ord. 1 Aug. 1741, and 28 Aug. 1828, see note to Ord. I. 13, p. 371, *post;* for the Ord. 8 July, 1842, see head (3) of note (*e*), p. 146, *ante;* for the Ord. 27 July, 1852, as to the routine of investing cash, see Daniell, 1630; and for the practice under the Drainage Acts see head (4) of note (*e*), p. 146, *ante.*

Regulations.

(*c*) See the regulations as to fees and business, printed in the Appendix, pp. i.—lxxxvii. *post;* and see note (*a*), p. liii. of the Appendix, as to the force of these regulations.

Rule 3. Old suits, &c.

3. All suits and proceedings instituted at any time or

times heretofore, and now governed by a practice of an earlier date than the present practice, shall continue to be so governed, except so far as these Consolidated Orders introduce any new practice.

Prelim. Ord. to be governed by the old practice.

4. The practice peculiar to claims shall continue in force with respect to claims filed, or to be filed, before the fifteenth day of February, 1860.

Rule 4. Practice as to claims filed before 15 Feb., 1860.

5. Notwithstanding anything hereinbefore expressed, the abrogation hereinbefore made shall not affect any practice of the said Court, or any practice or usage of, in, or connected with any of the offices of the said Court, or the officers thereof, which originated in, or was sanctioned by, any of the Orders hereby abrogated, and is now existing, except so far as the same may be inconsistent with anything hereinafter contained.

Rule 5. Established practice originated in or sanctioned by Orders hereby abrogated not to be affected.

6. Where any of the Orders hereby abrogated were intended to abolish any office, writ, practice, matter, fee, or thing, such abrogation shall not have the effect of reviving the same.

Rule 6. No revival of offices, &c., abolished by abrogated Orders.

7. Every Order or part of an Order hereinafter contained which is a repetition, without variation, of an Order or part of an Order hereby abrogated, shall receive the same construction as was put on such abrogated Order or part of an Order, and shall operate, not as a new Order, but in the same manner, whether as to the time of operation or otherwise, as such abrogated Order or part of an Order would have operated if this consolidation had not been effected.

Rule 7. Construction of Consolidated Orders, where no variation.

8. Every Order or part of an Order hereinafter contained which is a repetition, with variation, of an Order or part of an Order hereby abrogated, shall receive the same construction as was put on such abrogated Order or part of an Order, and shall operate, not as a new Order, but in the same manner, whether as to the time of operation or otherwise as such abrogated Order or part of an Order would have operated if this consolidation had not been effected, except so far as such variation indicates a contrary intention. And where the variation is of such a character as to be reasonably attributable, not to a

Rule 8. Construction where variation.

Prelim. Ord.

variation of intention, but simply to a design to harmonise the style or language of the several Orders hereinafter incorporated, such variation shall not be deemed to indicate any such contrary intention.

Rule 9. New Orders to take effect on 15 Feb., 1860.

9. All such Orders or parts of Orders hereinafter contained as are entirely new Orders or parts of Orders, and all such Orders or parts of Orders hereinafter contained as, having regard to the last preceding Rule of this Preliminary Order, shall be properly deemed to be new Orders or parts of Orders, shall take effect on the fifteenth day of February, 1860, as to suits and matters now depending or hereafter to be commenced or originated.

Rule 10. Interpretation clause.

10. In these Orders, the following words have the several meanings hereby assigned to them, over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction, viz. :—

Article (1). (1.) Words importing the singular number include the plural number, and words importing the plural number include the singular number.

Article (2). (2.) Words importing the masculine gender include females.

Article (3). (3.) The word "person" or "party" includes a body politic or corporate; and the word "person" means any person, whether a party to a suit or proceeding or not.

Article (4). (4.) The word "bill" includes information.

Article (5). (5.) The word "plaintiff" includes informant.

Article (6). (6.) The word "affidavit" includes affirmation, and attestation upon honour; and the word "sworn," includes affirmed and attested upon honour.

Article (7). (7.) The word "receiver" includes consignee and manager.

Article (8). (8.) "The Accountant-General" means the Accountant-General of the High Court of Chancery.

Article (9). (9.) The "Bank" means the Bank of England, or the Governor and Company of the Bank of England.

(10.) The word "decree" or "order" includes a dismission. Prelim. Ord. Article (10).

(11.) In the Rules at the end of which the Orders of the 30th of March, 1859, are referred to, the word "party" means any person appearing at the hearing of the cause, or of the application respectively, as the case may be; and when any period is therein specified, the same shall (except as to decrees and orders made in vacations) be computed exclusive of vacation (30th March, 1859; Ord. 1). Article (11).

(12.) In the Rules at the end of which the Orders of the 22nd of August, 1859, are referred to, the word "money" includes interest or dividends on stock or securities, or any accumulations of interest or dividends (22nd Aug. 1859; Ord. 1). Article (12).

[Rule 11 provides for the custody of the originals of the General Orders.]

ORDER I.

Officers of the Court.

I. *Accountant-General* (*a*).

Order I. Officers of the Court.

*1. Where the Accountant-General is directed by any decree or order to pay any sum or sums of money to an unmarried woman, and such decree or order does not extend to the transfer or delivery to such woman of any stocks or securities, and such woman marries before payment of such sum or sums of money, the Accountant-General, if such sum of money does not, or such sums of money in the whole do not exceed 200*l.* (*b*) of principal money or 10*l.* in annual payments, may draw for such money in favour of such woman and her husband, upon proof of the marriage, and upon an affidavit of such woman and her husband (*c*) that no settlement or agreement for a settlement whatsoever has been made or entered into, before, upon, or since their marriage, or in case any such settlement or agreement for a settlement has been made or entered into, then upon an affidavit of

Rule *1. Sums under 200*l.*, &c., ordered to be paid to women who marry before payment.

ORDER I. Officers of the Court.

such woman and her husband, identifying such settlement or agreement for a settlement, and stating that no other settlement or agreement for a settlement has been made or entered into as aforesaid, and an affidavit of the solicitor of such woman and her husband, that such solicitor has carefully perused such settlement or agreement for a settlement, and that according to the best of his judgment such sum or sums of money is not or are not, nor is nor are any part or parts thereof, subject to the trusts of such settlement or agreement for a settlement, or in any manner comprised therein or affected thereby (16th Feb. 1807) (*d*).

Accountant-General. *Cheques and certificates.*

(*a*) As to the practice generally in the Accountant-General's office, see Daniell, 1607—1656.

By the late Act, 30 & 31 Vict. c. 87, s. 11, *cheques* drawn by the Accountant-General on the Bank are to be countersigned by one of his clerks instead of by the registrars. And by Ord. 12th Feb. 1863 (p. 636, *post*), his certificates are to be signed by his chief clerk.

Payment out of Court.

As to giving special directions in regard to payment out, see *Attorney-General* v. *Vint*, 3 De G. & Sm. 705; *Dale* v. *Hayes*, 2 Sm. & Giff. App. vii.; *Re Waybank*, 2 Jur. N. S. 324; and for the practice as to payment of monies out of court to married women, tenants in tail, &c., see note (*h*), p. 37, *ante*, and for form of Orders, see Seton, 67, 71.

Prospective orders.

A prospective order for payment out of sums hereafter to be paid in was made in *Re Chamberlain*, 22 Beav. 286; *Lambie* v. *Lambie*, 9 Hare, App. 84; but see *Re Bowes*, 12 W. R. 569.

So the Accountant-General may be ordered to pay the income of a fund in court to "the vicar for the time being of a parish," *Re Pearce*, 24 Beav. 491; cf. *Attorney-General* v. *Brandreth*, 1 Y. & Coll. C. C. 202; *Re Collins's Charity*, 29 L. J. Ch. 168; *Re Wright's Settlement*, 1 Sm. & Giff. App. v.; *Re How*, 15 Jur. 266; *Re Brent*, 8 W. R. 270; *Reeve* v. *Attorney-General*, 3 Hare, 198; and as to the time of making the transfer directed by the Order, *Collett* v. *Maule*, 13 Jur. 672; *Ferguson* v. *Tadman*, 1 R. & M. 331.

Sums under 200*l.*

(*b*) Where a sum was over 200*l.*, but would be reduced below that sum after payment of certain costs to which it was liable, the Court refused to allow it to be paid out to the husband without his wife's consent in court (*Beaman* v. *Dodd*, 13 L. J. Ch. 141). But this case was not followed by V.-C. Stuart in *Roberts* v. *Collett*, 1 Sm. & Giff. 138.

Wife's equity to a settlement.

The wife, if she insist on her right, is entitled to a settlement, though the fund be under 200*l.*, *Re Cutler*, 14 Beav. 220; *Re Kincaid's Trusts*, 1 Drew. 326; but if the sum is under 200*l.* she may waive her equity to a settlement, without being separately examined. If it is over 200*l.*, a married woman waiving this equity must be examined, even when it is asked that the money may be paid to her instead of to her husband, *Mawe* v. *Heaviside*, 7 Jur. N. S. 817; *Gibbons* v. *Kelley*, 10 W. R. 55, (where the lady was resident abroad and a commission was directed). See Daniell, 98, and notes to *Lady Elibank* v. *Montolieu*, 1 White & Tudor's Leading Cases.

See as to payment out of *unascertained* sums belonging to a married woman, *Moss* v. *Dunlop*, Johns. 490; *Anon.*, 5 Jur. N. S. 1124; Daniell, 97.

Affidavit in case of payment out to widow.

(*c*) A widow seeking for payment out of court of monies to which she has become entitled since her husband's death, must make an affidavit that there is no settlement (*Ebrington* v. *Ebrington*, 4 Drew. 545). And as a general rule the affidavit will always be required (*Hough* v. *Ryley*, 2 Cox. 157; and see

ORDER I. Officers of the Court.

Clayton v. *Graham*, 10 Ves. 288; *Britten* v. *Britten*, 9 Beav. 143). If there be a settlement it must be produced (*Rose* v. *Rolls*, 1 Beav. 270).

When the interest in the fund had been assigned, and it was found impossible to obtain an affidavit of no settlement, the Court, on proof that there were no children of the marriage, dispensed with the affidavit (*Clark* v. *Woodward*, 25 Beav. 455); so where the fact that there was no settlement had been found by the Master (*Hedges* v. *Clarke*, 1 De G. & Sm. 354). In another case (*Anon.*, 3 Jur. N. S. 839), the husband's affidavit was dispensed with upon an affidavit of the wife that there was no settlement, &c., coupled with another affidavit that the husband had refused to make the affidavit.

Affidavit of no settlement when dispensed with.

So where the share to be paid out was less than 10*l.*, an affidavit of no settlement was dispensed with, *Veal* v. *Veal*, 4 L. R. Eq. 155.

(*d*) The latter part of this rule is new. The original Order (dated the 16th February, 1806), only required the affidavit to state the marriage, and that no settlement, &c., affecting the fund had been made thereon.

Form of affidavit.

Rule *2. Stocks, funds, shares, or securities under 200*l.*, &c., ordered to be transferred or delivered to women who marry before transfer, &c.

*2. Where the Accountant-General is directed by any decree or order to transfer or deliver any stocks, funds, shares, or securities to an unmarried woman, and such decree or order does not extend to the payment to such woman of any money, and such woman marries before the transfer or delivery of such stocks, funds, shares, or securities, and the same do not in the whole exceed in value 200*l.* sterling, then, upon proof of the marriage, and upon an affidavit of such woman and her husband that no settlement or agreement for a settlement whatsoever has been made or entered into before, upon, or since their marriage, or, in case any such settlement or agreement for a settlement has been made or entered into, then, upon an affidavit of such woman and her husband, identifying such settlement or agreement for a settlement, and stating that no other settlement or agreement for a settlement has been made or entered into as aforesaid, and an affidavit of the solicitor of such woman and her husband, that such solicitor has carefully perused such settlement or agreement for a settlement, and that according to the best of his judgment such stocks, funds, shares, or securities are not, nor is any part thereof, subject to the trusts of such settlement or agreement for a settlement, or in any manner comprised therein or affected thereby, the Registrar may issue a certificate authorising the transfer or delivery of such stocks, funds, shares, or securities to such married woman and her husband; and the Accountant-General may thereupon transfer or deliver the same to them accordingly.

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Rule *3. Same course where money to be paid, and stocks, funds, shares, or securities to be transferred, &c., to women who afterwards marry.

*3. A similar course to that mentioned in the 1st and 2nd Rules of this Order shall be adopted in the case of money directed to be paid, and of stocks, funds, shares, and securities directed to be transferred or delivered to a woman who afterwards marries, where the aggregate value of such money, stocks, funds, shares, and securities does not exceed 200*l.*

Rule 4. Payments to surviving personal representatives on report or certificate.

4. Where any money is directed to be paid out of court to persons to be named in the report of a Master or in the certificate of the chief clerk of a judge, and a sum is reported or certified to be due to any persons as legal personal representatives (*e*), the same or any portion thereof for the time being remaining unpaid may, upon proof to the Accountant-General of the death of any of them, be paid to the survivors or survivor of them (28th July, 1852. See also 5th and 6th Ord. of 22nd Aug. 1859).

(*e*) See note (*h*), p. 37, *ante*. A representative *ad litem*, appointed under s. 44 of the Chancery Amendment Act, 1852, is not competent to receive money, note (*h*), p. 199, *ante*.

Payment to personal representatives.

Where stock had been transferred to the Commissioners for the Reduction of the National Debt, the Court refused to order, without inquiry, the stock to be transferred into the names of the legal representatives of the deceased person in whose name it had been standing seventeen years before (*Re Molony*, 1 J. & H. 249).

Rule 5. In other cases.

5. Where any money is directed to be paid out of court to the legal personal representatives of any person, or to any persons as legal personal representatives, the same or any portion thereof for the time being remaining unpaid may, upon proof to the Accountant-General of the death of any of such legal personal representatives, whether before, on, or after the day of the date of the decree or order, be paid to the survivors or survivor of them (22nd Aug. 1859; Ord. 5).

Rule 6. Where person, or his legal personal representatives, named in decree, order, report, or certificate.

6. Where any money is directed to be paid out of court to any person named in the decree or order, or named or to be named in any report or certificate, or his legal personal representatives, the same or any portion thereof for the time being remaining unpaid may, on proof to the Accountant-General of the death of such person, whether before, on, or after the day of the date of

the decree or order, be paid to such legal personal representatives, or the survivors or survivor of them (22nd Aug. 1859; Ord. 6).

Rule 7. Transfer or delivery to surviving personal representatives, made on certificate of registrar.

7. Where any stocks, funds, shares, or securities, are directed to be transferred or delivered out of court to the legal personal representatives of any person, or to any persons as legal personal representatives of any person, the Registrar may, upon proof of the death of any of such representatives, whether before, on, or after the day of the date of the decree or order, issue a certificate authorising the transfer or delivery of such stocks, funds, shares, or securities, to the survivors or survivor of them; and where any stocks, funds, shares, or securities are directed to be transferred or delivered out of court to any person, or his legal personal representatives, the Registrar may, upon proof of the death of such person, whether before, on, or after the day of the date of the decree or order, issue a certificate authorising the transfer or delivery of such stocks, funds, shares, or securities, to such legal personal representatives, or the survivors or survivor of them. And in any of the cases hereinbefore mentioned, such stocks, funds, shares, or securities, may be transferred or delivered accordingly (22nd Aug. 1859; Ord. 7).

Rule 8. Probate or letters of administration must, in cases under the 6th and 7th rules, have been granted within six years from decree, &c.

8. No principal sum of money, nor any stocks, funds, shares, or securities, shall, under the 6th or 7th Rule of this Order, be paid, transferred, or delivered out of court to the legal personal representatives of any person, under any probate or letters of administration purporting to be granted at any time subsequent to the expiration of six years from the day of the date of the decree or order directing such payment, transfer, or delivery (22nd Aug. 1859; Ord. 8).

Rule 9. Same rule as to payment of interest or dividends.

9. No interest or dividends shall, under the 6th Rule of this Order, be paid out of court to the legal personal representatives of any person, under any probate or letters of administration purporting to be granted at any time subsequent to the expiration of six years after the day of the date of the decree or order directing such payment, or after the last receipt of such interest or dividends,

ORDER I. Officers of the Court.

under such decree or order, which shall last happen (22nd Aug. 1859; Ord. 9).

Rule 10. Payment to a partner or partners on report or certificate.

10. Where any money is directed to be paid out of court to any persons named or to be named in a Master's report or chief clerk's certificate, and such money shall by such report or certificate be certified to be due to them as partners, the same may be paid to any one or more of such partners (22nd Aug. 1859; Ord. 10).

Rule 11. Investment of dividends on Bank Annuities purchased by the Accountant-General, pursuant to the Legacy Duty Acts.

11. Where any money paid into the Bank, with the privity of the Accountant-General, pursuant to the stat. 36 Geo. III. c. 52, s. 32 (*f*), and 37 Geo. III. c. 135, is laid out by the Accountant-General, pursuant to the said statutes, in the purchase of Bank 3*l.* per Cent. Annuities, the Accountant-General (unless he shall have received, on behalf of some person claiming to be entitled, notice in writing of an intended application to the Court or to a judge in chambers, for disposing of the fund, or for otherwise applying the dividends thereof), may from time to time, without any formal request for that purpose, lay out and invest the dividends on such stock, when so purchased, and all accumulations thereon, as the same shall accrue due in the purchase of like stock in trust in the same matter and account to which the original sum of stock stands (4th May, 1852).

(*f*) See *ante*, p. 65, as to the Legacy Duties Act.

Rule 12. Investment of interest and dividends and accumulations thereof by Accountant-General, under decree or order directing the same.

12. Where any decree or order directing the investment from time to time of any interest or dividends accruing upon any stocks, funds, shares, or securities standing in the name of the Accountant-General, in trust in or to the credit of any cause, matter, or account, or upon any stocks, funds, shares, or securities which may be directed to be transferred into the name of the Accountant-General, or to be carried over from one account to another, or upon any stocks, funds, shares, or securities which may be directed to be purchased with any cash in court, or with any cash to be paid into court with his privity, is brought to the Accountant-General for the purpose of having such direction for investment

ORDER I. Officers of the Court.

carried into effect, the Accountant-General may, from time to time, until he shall receive notice of a decree or order to the contrary, without any further request, invest the interest or dividends so directed to be invested, together with all accumulations of interest or dividends thereon, as soon as conveniently may be after they shall accrue due and have been received, in the purchase of the particular description of stocks, funds, shares, or securities named in the decree or order directing such investment, and place such stocks, funds, shares, or securities when purchased, to the credit of the cause, matter, or account respectively, as may be directed by such decree or order (3rd June, 1853).

Rule 13. Purchase of Exchequer bills or bonds under decree or order.

13. Where, by any decree or general or special order, any money is directed to be laid out with the privity of the Accountant-General, in the purchase of Exchequer bills or bonds to be deposited in the Bank to the credit of any cause, matter, or account, and where any Exchequer bills or bonds shall be deposited in the Bank, with the privity of the Accountant-General, to the credit of any cause, matter, or account, any principal money or interest which may thereafter be received and paid into the Bank in respect of such bills or bonds, or of any bills or bonds to be purchased with principal money or interest in pursuance of this Rule, or in respect of any exchanged bills or bonds, shall (unless the decree or order shall otherwise direct), from time to time, as the same shall be so received and paid into the Bank, be also laid out in the purchase of Exchequer bills or bonds, with the privity of the Accountant-General, and such Exchequer bills or bonds (*g*), when so purchased, shall be deposited in the Bank with the privity of the Accountant-General, and placed to the credit of the same cause, matter, or account, subject to the further order of the Court (22nd Aug. 1859; Ord. 14).

(*g*) For the Bank's duty to receive interest on Exchequer bills, &c. without special order, see Ord. 28 Aug. 1828, cited Daniell, 1626.

Interest on Exchequer bills, Ord. Aug. 28, 1828.

Rule 14. Accountant-

14. Where, under or in pursuance of any decree or general or special order, any money shall be invested in

ORDER I. Officers of the Court.

General to declare trust, without direction in order for investment or transfer.

the name of the Accountant-General, and with his privity, in the purchase of any stocks, funds, shares, or securities, or any stocks, funds, shares, or securities shall be transferred into his name and with his privity in the books of the Bank or of any other public company, he shall declare the trust thereof to be to attend the order of this Court, without any direction for that purpose in the decree or order directing such investment or transfer (22nd Aug. 1859; Ord. 2).

Rule 15. Accountant-General to draw on the Bank according to the Act and Orders, without direction.

15. For the purpose of any payment or investment, to be made under any decree or general or special order, of or out of any money in the Bank on the credit of any cause, matter, or account, the Accountant-General shall (without any direction for that purpose in such decree or order) draw on the Bank according to the form prescribed by the Act of Parliament made and passed in the twelfth year of the reign of his Majesty King George the First, intituled, "An Act for the bette securing the Monies and Effects of the Suitors of the Court of Chancery, and to prevent the counterfeiting of East India Bonds and Indorsements thereon, and likewise Indorsements on South Sea Bonds," and the General Rules and Orders of this Court in that case made and provided (22nd Aug. 1859; Ord. 3).

Rule 16. Proceedings on sale of stocks, &c., standing in name of Accountant-General.

16. Where any stocks, funds, shares, or securities standing in the books of the Bank or of any other public company, in the name of the Accountant-General, in trust in or to the credit of any cause, matter, or account, are by any decree or order directed to be sold, the same shall be sold with the privity of the Accountant-General, and one of the cashiers of the Bank shall have notice to attend and receive the money to arise by such sale, and upon receipt thereof shall forthwith pay the same into the Bank, with the privity of the Accountant-General, to the credit of the cause, matter, or account in trust in or to the credit of which such stocks, funds, shares, or securities were standing immediately before the sale, without any direction for that purpose in the decree or order directing such sale (22nd Aug. 1859; Ord. 4).

II. *Examiners.*

(See Order XIX. on *Evidence.*)

III. *Registrars* (*h*).

Rule 17. Attendance of registrars.

17. The registrars shall attend the several courts of the Lord Chancellor, the Lords Justices of the Court of Appeal, the Master of the Rolls, and the three Vice-Chancellors, in rotation, week by week, on alternate days (21st Dec. 1833; Ord. 27. 4th July, 1850).

(*h*) See as to the power and duties of the registrars generally, *Davenport* v. *Stafford*, 8 Beav. 503; Seton on Decrees, p. 1137, and the Regulations of March 15, 1860, Appendix, p. lxxx. *post.* Powers of registrars.

The registrar in drawing up decrees may, by consent, introduce such alterations in the decree as he thinks the Court would sanction, and such alterations will be binding on the parties. See observations of Lord Langdale in 8 Beav. 511.

Rule 18. Entry of decrees, orders, præcipes for attachments, and other documents.

18. All decrees and orders drawn up by the Registrars, or by the Chief Clerks to the Judges, and all præcipes for attachments, and such other documents (if any) as, according to the present practice or the practice for the time being, ought to be entered by the entering clerks to the Registrars, shall be entered by them without abbreviations, and in a clear and legible hand, under the direction of the senior Registrar for the time being, within one clear day after the same shall be left for entry; and all such entries shall be examined by one of the said entering clerks, and be marked with his initials, to denote such examination (21st Dec. 1833; Ord. 30. 16th Oct. 1852; Ord. 28. 9th Nov. 1852; Ord. 2) (*i*).

(*i*) The decree or order is said to be "*passed*" when the Registrar has inserted his initials in the last page, as an authority to the Clerk of Entries to *enter* it in the Registrar's book (Seton, 1139). All proceedings on a decree or order before it is entered are voidable and irregular (*Tolson* v. *Jervis*, 8 Beav. 364, where an attachment under an order not entered up was discharged). When passed and entered it can only be varied on a rehearing, except in cases of fraud (Mitf. Pl., p. 73). But even in cases of fraud it cannot be rectified on petition *Mossel* v. *Morgan*, 1 Br. Ch. Ca. 74; see note (*a*) to Ord. XXXIV., *post.* Passing and entering orders and decrees.

Rule 19. Indexes to such entries.

19. Proper calendars or indexes of such entries shall be made by the said entering clerks, so that the same may be conveniently referred to when required. And such calendars or indexes, and the books in which such

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entries are made, shall, when completed, be transmitted to the Report Office, to be there preserved under the direction of the Clerks of Records and Writs, and shall, at all times during office hours, be accessible to the public on payment of the usual fee (*j*) (21st Dec. 1833; Ord. 30).

To be accessible on payment of fees.

(*j*) See Regul. as to Fees, 1860, Appendix, p. xlix. *post.*

Rule 20. Counsel's briefs, &c., to be left with the registrar by person bespeaking a decree or order.

20. At the time of bespeaking a decree or order, the party bespeaking the same shall leave with the Registrar his counsel's briefs, and such other documents as may be required by the Registrar, for the purpose of enabling him to draw up the same (30th March, 1859; Ord. 2) (*k*).

(*k*) See Registr. Regul. 15, *et seqq.* Appendix, p. lxxxiii. *post.*

Rule 21. Decree or order to be bespoken, and documents left with registrar, within seven days after decree pronounced.

21. Every decree or order shall be bespoken, and the briefs and such other documents as are mentioned in the next preceding rule shall be so left with the Registrar within seven days after the decree or order is pronounced or finally disposed of by the Court (30th March, 1859; Ord. 3).

Rule 22. Consequence of default.

22. In case any decree or order is not bespoken, and the briefs and other requisite documents are not left with the Registrar within the time prescribed by the next preceding rule, the Registrar may decline to draw up the decree or order without the leave of the Court (30th March, 1859; Ord. 4).

Rule 23. Time for settling draft decree or order to be appointed in writing.

23. At the time of delivering out the draft of any decree or order which requires to be settled by the Registrar in the presence of the parties, the Registrar shall deliver out, to the party on whose application the draft has been prepared, an appointment in writing of a time for settling the same (30th March, 1859; Ord. 5).

Rule 24. Service of a copy of such appointment on opposite party.

24. A copy of such appointment shall be served on the opposite party one clear day at least before the time fixed thereby for settling the draft decree or order; and the party serving such copy, and the party so served, shall attend such appointment, and produce to the Registrar their briefs and such other documents as may be neces-

Attendance at the time ap-

sary to enable him to settle the draft (30th March, 1859; Ord. 6) (*l*).

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(*l*) See note (*k*), *supra*.

An order drawn up in the absence of a defendant will not, unless error either of form or substance be shown, be set aside (*Smith* v. *Acton* (No. 2), 26 Beav. 559). A notice to draw up an order served one day for the next is regular (*Re Christmas*, 19 Beav. 519).

pointed with briefs and documents.

Order drawn up in absence of defendant.

25. Service of such appointment shall be effected by leaving a copy thereof at the place for service of the party to be served, or by transmitting a copy thereof by the post to such party at such place for service (30th March, 1859; Ord. 7).

Rule 25. Appointment how served.

26. At the time fixed for settling the draft, the original appointment, together with a memorandum endorsed thereon of the service of a copy thereof on the opposite party, and signed by a person by whom such service was effected, shall be delivered to the Registrar, in order that he may be satisfied that service has been duly effected, but the Registrar may require such service to be verified by affidavit (30th March, 1859; Ord. 8).

Rule 26. Proof of service to be produced to registrar.

27. When the draft, decree, or order has been settled by the Registrar, he shall name a time in the presence of the several parties, or else deliver out an appointment in writing of a time for passing the decree or order (*m*). And, in the latter case, such appointment shall be served on the opposite party, in like manner as directed by the 24th and 25th Rules of this Order with reference to an appointment to settle the draft, decree, or order; and the original appointment, together with a memorandum indorsed thereon of the service of a copy thereof on the opposite party, and signed by the person by whom such service was effected, shall be delivered to the Registrar, in order that he may be satisfied that service has been duly effected; but the Registrar may require such service to be verified by affidavit (30th March, 1859; Ord. 9).

Rule 27. Time for passing the decree or order to be named or appointed.

Service of appointment.

Proof of service to be produced to registrar.

(*m*) See as to passing the order, note (*i*), *ante*.

28. If any party fails to attend the Registrar's appointment for settling the draft of or passing any decree or order, or fails to produce his briefs and such other docu-

Rule 28. Default in attending appointment

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with briefs and documents.

ments as the Registrar may require to enable him to settle such draft or pass such decree or order, the Registrar may proceed to settle the draft or pass the decree or order in his absence, and the Registrar shall be at liberty to dispense with the production of counsel's briefs, and to act upon such evidence as he may think fit of the actual appearance by counsel of the party failing to attend or to produce such documents or papers as aforesaid, or may require the matter to be mentioned to the Court (30th March, 1859 ; Ords. 10 and 11) (*n*).

(*n*) See *Yeatman* v. *Read*, 14 W. R. 123, for a motion under this section.

Rule 29. Form of appointment.

29. The Registrar's appointment may be in the following form :—

Chancery Registrar's Office, Chancery Lane,
1860.

"A. *v.* B."
or
"In the matter of A."

I have appointed the day of 1860, at o'clock in the forenoon, to settle the draft of [*or*, to pass] the decree [*or*, order] pronounced in this cause [*or*, matter] by [the Master of the Rolls] on the day of

C. D.,
Registrar.

(30th March, 1859 ; Ord. 12).

Rule 30. Filing of appointment.

30. The Registrar's appointments, with the indorsements, if any, thereon, shall be filed by the Registrar (30th March, 1859 ; Ord. 13).

Rule 31. Adjournment of appointment.

31. The Registrar may adjourn any appointment for settling the draft of or passing any decree or order, to such time as he may think fit; and the parties who attended the appointment shall be bound to attend such adjournment without further notice (30th March, 1859 ; Ord. 14).

Rule 32. Settling or passing decree

32. Notwithstanding the preceding rules of this order, the Registrar shall be at liberty, in any case in which he

may think it expedient so to do, to settle and pass the decree or order without making any appointment for either purpose, and without notice to any party (30th March, 1859; Ord. 15) (*o*). ORDER I. Officers of the Court. or order without appointment or notice.

(*o*) See, before the rule, *Hargrave* v. *Hargrave*, 3 Mac. & G. 348; *Hart* v. *Tulk*, 6 Hare, 611.

33. The Registrars shall from time to time meet, and consider such orders, rules, or regulations as may appear to them, or the majority of them, calculated to expedite and facilitate the satisfactory transaction of the business of the suitors in their office, and report such orders, rules, or regulations to the Lord Chancellor, to the end that, if the same be approved by him, proper steps may be taken for such orders, rules, or regulations being adopted and duly made general orders, rules, or regulations of the Court (3rd June, 1850; Ord. 14) (*p*). Rule 33. Meetings of registrars.

(*p*) See Appendix, p. lxxx.

IV. *Taxing Masters.*

(See Order XL. on *Costs.*)

V. *Chief Clerks of the Judges.*

(See Order XXXV. on *Proceedings in Chambers.*)

*34. The Chief Clerks of the Judges shall from time to time meet, and consider such orders, rules, or regulations as may appear to them, or the majority of them, calculated to expedite and facilitate the satisfactory transaction of the business of the suitors in the Judges' Chambers, and report such orders, rules, or regulations to the Judges, to the intent that if they should approve of the same, they may authorise the Chief Clerks to submit the same to the Lord Chancellor, to the end that, if the same be approved by him, proper steps may be taken for such orders, rules, or regulations being adopted and duly made general orders, rules, or regulations of the Court. Rule *34. Meetings of Chief Clerks.

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VI. *Clerk of the Inrolments in Chancery and Clerks of Records and Writs.*

Rule 35. Clerks of Records and Writs to perform duties formerly performed by six clerks, sworn clerks, &c., except as solicitors.

35. The Clerks of Records and Writs shall have the care of all documents ordered to be deposited for safe custody, and shall also (besides other duties) perform all such duties as were performed by the six clerks, sworn clerks, or waiting clerks, as officers of the Court, in relation to the several matters hereinafter mentioned; that is to say,

The filing, custody, copying, and amending of all bills, demurrers, pleas, answers, and other pleadings and records (*q*).

The entrance of appearances, consents, notes, and memorandums of service.

The certifying of appearances and proceedings.

The custody of exhibits deposited for inspecting and copying.

The attendance with records and exhibits on the Judges of this Court, or at the assizes, or elsewhere.

The enrolment of decrees and orders.

And all such other duties as were performed by the six clerks, sworn clerks, or waiting clerks, as officers of the Court, in relation to suits and matters in equity, and not as attornies, solicitors, or agents of the parties in suits or matters in equity (26th Oct. 1842; Ord. 3. 16th Oct. 1852; Ord. 57).

Certificate of Clerk of Records and Writs.

(*q*) A certificate of the Clerk of Records and Writs is conclusive as to the filing of a pleading (*Beavan* v. *Burgess*, 10 Jur. 63). Under the 14th section of the 14 & 15 Vict. c. 99 (Evidence Act), relating to the proof of copies of books or documents admissible in evidence on their mere production from the proper custody, the Clerk of Records and Writs may be ordered to certify copies of the bill, answers, and depositions in his custody, to be used on the trial of an issue directed by the Court (*Reeve* v. *Hodgson*, 10 Hare, App. xix.).

Rule *36. Erasure, obliteration, improper mode of writing, or disfigurement in pleadings or affidavits.

*36. The Clerks of Records and Writs shall be at liberty to refuse to file any plea, answer, or affidavit, in which there is any knife erasure, or any plea, answer, or affidavit which is blotted so as to obliterate any word, or which is improperly written, or so altered as to cause any material disfigurement, or any plea, answer, or affidavit

in which there is any interlineation of any word or words, unless the person before whom the same is sworn duly authenticate such interlineation with his initials in such manner as to show that the interlineation of such word or words was made before such plea, answer, or affidavit was sworn, and so as to mark the extent of such interlineation (15th Nov. 1660. 18th July, 1666 (*r*).

(*r*) As to the form of affidavits, see Ord. XVIII. 1.

Erasures in exhibits, &c.

Erasures were held fatal to an affidavit, unless proved to have been made before it was sworn, *Gill* v. *Gillard*, 9 Hare, App. xvi.

But erasures in the recital of the contents of an exhibit were permitted, *Savage* v. *Hutchinson*, 24 L. J. Ch. 232, and interlineations in *Vorweig* v. *Barweiss*, 3 W. R. 259.

Rule 37. Practice as to writs.

37. The Clerks of Records and Writs shall keep a seal, in such form and bearing such impression as the Lord Chancellor shall approve; and any person desirous of suing out any of the writs specified at the end of this rule may prepare the same in the present form, with such alterations and variations as circumstances may require, and may present such writ for sealing to the Clerks of Records and Writs; and such writs shall be open writs, and it shall not be necessary for the Lord Chancellor to sign any such writ. And the Clerks of Records and Writs, upon any such writ being presented for sealing, shall ascertain whether such writ is correct in form, and whether the person presenting the same is, according to the course and practice of the Court, entitled to sue out the same, and in case it shall appear that such writ is correct in form, and that the person is entitled to sue out the same, such writ shall be forthwith sealed with such seal as aforesaid, and shall, when so sealed, have the same force and validity as such writ had when sealed with the great seal (26th Oct. 1842; Ord. 4. 8th May, 1845; Ord. 24).

The writs above referred to in this rule are the following:—Writ of Assistance, Writ of Attachment, Commission to assign a Guardian, Commission to examine Witnesses, Writ of Distringas, Writ of Elegit, Writ of Fieri Facias, Writ of Habeas Corpus, Writ of Injunction, Writ of Ne Exeat Regno, Writ of Dower, Com-

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mission of Partition, Commission to distinguish and divide Lands, Writ of Sequestration, Writ of Subpœna, Writ of Venditioni Exponas, Writ of Fieri Facias de Bonis Ecclesiasticis, Writ of Sequestrari Facias de Bonis Ecclesiasticis, and Writ of Inquiry of Damages (*s*).

(*s*) As to these writs, see references in index.

Rule 38. Security for costs.

38. Where security of costs is directed to be given, such security shall be given to the Clerk of Records and Writs in whose division the cause or matter is (26th Oct. 1842; Ord. 6 (*t*)).

(*t*) See, *post*, Ord. XL. 6, and notes thereto.

Rule 39. Pleas, answers, and affidavits before whom sworn.

39. Pleas, answers, and affidavits may be sworn before any Clerk of Records and Writs, or before the Clerk of Inrolments in Chancery, as occasion may require (26th Oct. 1842; Ord. 7).

Rule 40. Acknowledgments for inrolling deeds.

40. All acknowledgments required for the purposes of inrolling any deed or other document in Chancery may be made before the Clerk of Inrolments in Chancery, or before any Clerk of Records and Writs, as occasion may require (26th Oct. 1842; Ord. 1).

Rule 41. Inrolments to be transmitted to the Public Record Office.

41. The Records of all Deeds and Recognisances inrolled shall be sent by the Clerk of the Inrolments to the Public Record Office, Rolls Yard, within two years from the time of the inrolment thereof (3rd July, 1676. 9th June, 1686).

Rule 42. Records not to be removed.

42. No person shall carry away any record from the Public Record Office, Rolls Yard, to any other place, without the direction of the Master of the Rolls, nor take out of the office of the Clerks of Records and Writs any record or document filed there, except by the direction of the Court (*u*) (25th Dec. 1574).

Office copies.

(*u*) Unless satisfied that the office copy is insufficient the Court will not order production of the original document (*Attorney-General* v. *Ray*, 6 Beav. 335; and see 2 Hare, 518; 3 Hare, 335; and *Jervis* v. *White*, 8 Ves. 313). The application for the order should not be *ex parte* (*Lamb* v. *Danby*, 9 W. R. 765).

Rule 43. Deposit to answer fees.

43. Any Clerk of Records and Writs, being required to attend with any record or document at any assizes or at

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any court or place out of the Court of Chancery or the offices thereof, shall be entitled to require that the solicitor or party desiring his attendance shall deposit with him a sufficient sum of money to answer his just fees, charges, and expenses in respect of such attendance, and undertake to pay any further just fees, charges, and expenses which may not be fully answered by such deposit (26th Oct. 1842; Ord. 8).

Rule 44. Filing and transmitting of certificates, petitions, admissions of evidence, submissions to arbitration, and awards made orders of Court.

44. All certificates of the Chief Clerk of a judge, (after the same shall have been signed by the judge in cases where his signature is required) and all petitions, and written admissions of evidence whereon any order is founded, and all submissions to arbitration and awards made orders of this court, shall be transmitted to and left at the Report Office, to be there filed or preserved under the direction of the Clerks of Records and Writs. And all office copies thereof, or of any part thereof, that may be required, shall be ready to be delivered to the party requiring the same, within forty-eight hours after the same shall have been bespoken (21st Dec. 1833; Ord. 30. 16th Oct. 1852; Ord. 50).

Office copies to be delivered out within 48 hours.

Rule 45. Date of filing proceedings.

45. Upon every pleading or other proceeding which is filed under the direction of the Clerks of Records and Writs, the date of filing the same shall be printed or written (see Ord. of 22nd May, 1661; Sanders, 297).

Rule 46. Indexes to reports, &c., to be kept and to be accessible.

46. Proper indexes or calendars to the files or bundles of the reports, certificates, exceptions to reports, petitions, admissions of evidence, and all other documents filed at the Report Office, shall be kept by the Clerks of Records and Writs; so that the same may be conveniently referred to when required. And such indexes or calendars and documents shall, at all times during office hours, be accessible to the public, on payment of the usual fee (*v*) (21st Dec. 1833; Ord. 30).

(*v*) See Regul. as to Fees, 1860, Appendix, p. xlix. *post.*

Rule 47. Entry of time of delivering certificate, with

47. The Clerks of Records and Writs shall also enter in the books kept by them for that purpose, the time when any certificate is delivered to them to be filed, with the

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name of cause and date of certificate. Of time of delivery of other documents, such entry to be accessible.

name of the cause and the date of the certificate. And the like entry shall be made of the time of delivery of every other document filed at the Report Office. And such books shall, at all times during office hours, be accessible to the public, on payment of the usual fee (*w*) (21st Dec. 1833 ; Ord. 30).

(*w*) See last note.

Rule 48. Reference to record to be written or stamped on documents.

48. Every decree, order, report, certificate, petition, or document, made, presented, or used in any cause in this court, shall be distinguished by having plainly written or stamped on the first page of such decree, order, report, certificate, petition, or document, the year, the letter, and the number by which the cause is distinguished in the cause books kept by the Clerks of Records and Writs (30th Nov. 1855 ; Ord. 1).

Rule 49. Dates of decrees, &c., be entered in cause books.

49. The Clerks of Records and Writs shall, in addition to the entries formerly made by them in their respective cause books, enter therein respectively the date of every decree, order, report, and certificate, which shall be made in each cause (30th Nov. 1855 ; Ord. 2).

Rule 50. References to dates and folios of registrar's book.

50. The entry of every such decree and order in such cause books shall contain a reference to the date and folio of the registrar's book in which such decree or order shall have been entered (30th Nov. 1855 ; Ord. 3).

Rule 51. Rules not to apply to causes commenced before Nov. 2, 1852.

51. The last preceding three Rules of this Order shall not apply to any cause commenced before the first day of Michaelmas Term, 1852 (30th Nov. 1855 ; Ord. 4).

Rule 52. Applications to Court of Exchequer for documents, &c., in Exchequer causes transferred into Chancery.

52. The Clerk of Record and Writs in whose division any cause transferred from the Court of Exchequer to the Court of Chancery may be, shall, upon request of any of the parties thereto, apply to the Court of Exchequer for the records or other documents in such cause not before brought into the Court of Chancery (26th Oct. 1842 ; Ord. 30).

Rule 53. Certificate of proceedings in a cause or

53. For the purpose of enabling all persons to obtain precise information as to the state of any cause or matter, and to take the means of preventing improper delay in

the progress thereof, any Clerk of Records or Writs shall, at the request of any person whether a party or not in the cause or matter inquired after, but on payment of the usual fee (*x*), give a certificate specifying therein the dates and general description of the several proceedings which have been taken in such cause or matter in the Record and Writ Clerks' Office (3rd April, 1828; Ord. 43).

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matter to be given.

(*x*) See note (*v*), p. 381.

ORDER II.

ORDER II. Conveyancing Counsel of the Court.

Conveyancing Counsel of the Court.

1. (*a*) The business to be referred to the Conveyancing Counsel nominated by the Lord Chancellor, under the stat. 15 & 16 Vict. c. 80, s. 41, shall be distributed among such counsel in rotation by the first clerk to the Registrars for the time being, and during his occasional or necessary absence by the second clerk to the Registrars for the time being, and during the occasional or necessary absence of both such clerks, then by such one of the other clerks to the Registrars as the Senior Registrar for the time being may nominate for that purpose (16th Dec. 1852; Ord. 1).

Rule 1. Business referred to Conveyancing Counsel, to be distributed in rotation.

(*a*) The cases relating to the duties of the conveyancing counsel are given in the notes to 15 & 16 Vict. c. 80, ss. 40, 41, *ante*, p. 158; and as to fees, see Ord. XL. 30, and note thereto.

2. The clerk making such distribution shall be responsible for the business being distributed according to regular and just rotation, and in such manner as to keep secret from all persons the rota or succession of Conveyancing Counsel to whom such business may be referred; and it shall be his duty to keep a record of such references, with proper indexes, and to enter therein all such references, with the dates when the same are made (16th Dec. 1852; Ord. 2).

Rule 2. Duty of person distributing.

ORDER II. Conveyancing Counsel of the Court.

Rule 3. Opinion, &c., of the Conveyancing Counsel, how obtained.

3. When the Court or a judge at chambers directs any business to be referred to any such Conveyancing Counsel, a short memorandum or minute of such direction shall be prepared and signed, by the Registrar if the same shall have been given in Court, or by the Judge's Chief Clerk, if given in chambers; and the party prosecuting such direction, or his solicitor, shall take such memorandum or minute to the Registrar's Clerk whose duty it is to make such distribution as aforesaid; and such clerk shall add at the foot thereof a note specifying the name of the Conveyancing Counsel in rotation to whom such business is to be referred; and such memorandum or minutes shall be left by the party prosecuting such direction, or his solicitor, with such Conveyancing Counsel, and shall be a sufficient authority for him to proceed with the business so referred (16th Dec. 1852; Ord. 3).

Rule 4. Counsel in rotation unable or declining to act.

4. In case the Conveyancing Counsel in rotation shall from illness or from any other cause be unable or decline to accept any such reference, the same shall be offered to the other Conveyancing Counsel appointed as aforesaid, successively, according to their seniority at the bar, until some one of them shall accept the same (16th Dec. 1852; Ord. 4).

Rule 5. Liberty to direct or transfer reference to any one of such Counsel in particular.

5. The preceding Rules of this Order are not to interfere with the power of the Court, or of the judge at chambers, to direct or transfer a reference to any one in particular of the said Conveyancing Counsel, where it appears to the Court or the judge to be expedient (16th Dec. 1852; Ord. 5) (*b*).

(*b*) See *Re Martin*, 22 L. J. Ch. 248.

ORDER III.

ORDER III. Solicitors and Parties acting in Person, and Service on them respectively.

SOLICITORS AND PARTIES ACTING IN PERSON, AND SERVICE ON THEM RESPECTIVELY.

Rule 1. Solicitors and

1. The solicitors of this court in all cases where the parties sue or defend by solicitors, and the parties them-

ORDER III. Solicitors and Parties acting in Person, and Service on them respectively.

selves in all cases where they sue or defend in person, shall perform all such duties as were formerly performed by the sworn clerks and waiting clerks, as attorneys, solicitors, or agents of the parties in relation to the several matters hereinafter mentioned, viz.:

parties suing or defending in person, to perform duties formerly performed by six clerks and waiting clerks, as attorneys, &c.

The making out of writs.

The serving and being served with writs, notices, orders, warrants, and other documents, proceedings, and written communications, in causes and matters depending in court (*a*).

The signing of elections and agreements to proceed at law or in equity.

The signing of petitions of re-hearing and appeal.

The entering of appearances and consents with the Registrar.

The signing of consents to petitions.

The tender and acceptance of costs.

The joining in commission and striking of commissioners' names.

The signing of notices by paupers (*b*).

And all other duties formerly performed by the sworn clerks and waiting clerks, as attorneys, solicitors, or agents of the parties in suits or matters in equity (26th Oct. 1842; Ord. 16).

(*a*) See as to service on solicitors, note (*g*) to sect. 4, *post*.
(*b*) As to signing notices for paupers, see *post*, Ord. VII. 11, p. 406, *post*.

Rule 2. Indorsements on pleadings of solicitor's name, &c., place of business, and address for service.

2. Every solicitor of a party suing or defending by a solicitor shall cause to be written or printed upon every writ or summons which he shall sue out, and upon every bill, demurrer, plea, answer, or other pleading or proceeding, and all exceptions, which he may leave with the Clerks of Records and Writs to be filed, and upon all instructions which he may give to the Clerks of Records and Writs for any appearance or other purpose, his name or firm, and place of business, and also (if his place of business shall be more than three miles from the Record and Writ Clerks' Office) another proper place (to be called his address for service), which shall not be more

ORDER III. Solicitors and Parties acting in Person, and Service on them respectively.

than three miles from the said office, where writs, notices, orders, summonses, warrants, and other documents, proceedings, and written communications, may be left for him. And where any such solicitor shall only be the agent of any other solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor (26th Oct. 1842; Ord. 17).

Rule 3. Solicitor not to be changed without order.

3. A party suing or defending by a solicitor (*c*) shall not be at liberty to change his solicitor (*d*) in any cause or matter without an order of the Court (*e*) for that purpose, which may be obtained by motion or petition as of course (*e*); and until such order is obtained and served, and notice thereof given to the Clerk of Records and Writs, the former solicitor shall be considered the solicitor of the party (26th Oct. 1842; Ord. 18) (*f*).

Plaintiff's solicitor.

(*c*) All the plaintiffs in a suit should appear by one solicitor, see *Peareth* v. *Peareth*, Johns. 58.

Discharge of solicitor.

(*d*) The order to change operates as a discharge by the client (*Webster* v. *Le Hunt*, 9 W. R. 804); and see *Ward* v. *Swift*, 6 Hare, 310.

Change in firm.

(*e*) The rule applies where there has been a change only in the firm of solicitors (*Muttlebury* v. *Hayward*, 8 Jur. 1085).

When a new solicitor may be employed without order to change.

A client may employ a new solicitor without obtaining an order to change solicitors in the following cases:—

(1.) Where money stands to the separate account of a party to a cause, and he petitions for payment out by a new solicitor, *Waddilove* v. *Taylor*, 17 L. J. Ch. 384.

(2.) Where the solicitor dies pending the suit, *Whalley* v. *Whalley*, 22 L. J. Ch. 632.

Subpœna to name a new solicitor.

If the solicitor of a party to the suit dies, and the party neglects to appoint a new one, he should be served with a *subpœna* to name a solicitor (see form in Appendix, p. viii. *post*), see *Gibson* v. *Ingo*, 2 Ph. 402, where on such *subpœna* being served on a defendant, and no solicitor appointed, the Court ordered a taxation to proceed in the defendant's absence.

So, where a defendant's solicitor died, and the plaintiff obtained an order that he might name a new one, which he failed to do, the Court directed the accounts to be taken in his absence (*Dean* v. *Lethbridge*, 26 Beav. 397).

When special order is necessary.

(*f*) Where there was a special contract respecting the employment of a solicitor, and an order, as of course, to change solicitors was obtained, the special contract being suppressed, such order was discharged with costs (*Richards* v. *Scarborough Market Company*, 17 Beav. 83; *Jenkins* v. *Bryant*, 3 Drew. 70; and see note (*m*), p. 17, *ante*; and see *Topping* v. *Searson*, 2 H. & M. 205).

Where no order obtained.

(*g*) Where there has been a change of solicitors without order, service of notices, &c., upon the old solicitors is regular (*Wright* v. *King*, 9 Beav. 161; *Davidson* v. *Leslie*, *ibid.* 104).

Lien of discharged solicitor how far affected.

As to how far the lien of a solicitor who is changed in the course of a suit will be affected by that circumstance, see *Cresswell* v. *Byron*, 14 Ves. 271; *Cane* v. *Martin*, 2 Beav. 584; *Commerall* v. *Poynton*, 1 Swanst. 1; *Colegrave* v. *Manley*, Turn. & Russ. 400; *Bozon* v. *Bolland*, 4 M. & Cr. 354;

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Heslop v. *Metcalfe*, 3 M. & Cr. 183, from which cases it seems that if the solicitor *voluntarily* withdraws, he must deliver the client's papers to the new solicitor, see Daniell, 1696. But where the solicitor *is discharged* by the client, though the reason is that he, the solicitor, is in embarrassed circumstances, he is not thereby disentitled to his lien (*Re Smith*, 9 W. R. 396); so where he was in custody for debt (*Re Williams*, 28 Beav. 465, 3 D. F. J. 104).

Priority of continuing solicitor's lien.

A solicitor who conducts a cause to its conclusion in the place of one who by arrangement with his client retires from conducting it, has priority for his costs in case of a deficiency of assets (*Cormack* v. *Beisley*, 3 De G. & J. 157).

Client entitled to use of papers notwithstanding lien.

Even where the lien subsists the client is entitled to the convenient use of his papers in pending business (*Rawlinson* v. *Moss*, 9 W. R. 733), where a question was raised as to the party liable to pay for the schedule of papers prepared for a client, before giving to his discharged solicitor a receipt for papers delivered over. See, too, *Webster* v. *Le Hunt*, 9 W. R. 804 (see p. 827, for terms of order); *Re Williams*, l. c.; *Griffiths* v. *Griffiths*, 2 Hare, 587; *Cane* v. *Martin*, 2 Beav. 584.

Rule 4. Where there is no address for service, solicitor to be served at his place of business.

4. Where a party sues or defends by a solicitor, and no address for service of such solicitor shall have been written or printed pursuant to the directions of the 2nd Rule of this Order, all writs, notices, orders, summonses, warrants, and other documents, proceedings, and written communications, not requiring personal service upon the party to be affected thereby, shall, unless the Court shall otherwise direct, be deemed sufficiently served upon such party, if served upon his solicitor (*h*) at his place of business. But if an address for service of such solicitor shall have been written or printed as aforesaid, then all such writs, notices, orders, summonses, warrants, and other documents, proceedings, and written communications, shall be deemed sufficiently served upon such party, if left for his solicitor at such address for service (26th Oct. 1842; Ord. 19).

Secus, where there is address for service.

(*h*) See *Wright* v. *King*, 9 Beav. 161; *Newton* v. *Thompson*, 16 Jur. 1008. Compare cases on substituted service in note (*b*), p. 419, *post*.

Service on solicitors.

As to service on solicitors generally, see *Re Wisewold*, 16 Beav. 357; *Re Catlin*, 18 Beav. 508; *Re Dufaur*, 16 Beav. 113; *Re Thomson*, 20 Beav. 545; *Wilson* v. *Emmett*, 19 Beav. 233; *Ex parte Belton*, 25 Beav. 368; *Re Walton*, 4 K. & J. 78.

Absconding solicitor.

In one case, the Court, under peculiar circumstances, allowed service to be effected on the solicitor by placing it under the door of his chambers, *Re Templeman*, 20 Beav. 574. And where the solicitor in the cause had absconded, he was held to be rightly served with a notice of motion left at his unoccupied place of business, *Newton* v. *Thompson*, 22 L. J. Ch. 10.

Rule 5. Parties suing or defending in person to indorse name and residence

5. (*i*) Every party suing or defending in person shall cause to be written or printed upon every writ which he shall sue out, and upon every bill, demurrer, plea, answer, or other pleading or proceeding, and all exceptions which

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he may leave with the Clerks of Records and Writs to be filed, and upon all instructions which he may give to the Clerks of Records and Writs for any appearance or other purpose, his name and place of residence, and also (if his place of residence shall be more than three miles from the Record and Writ Clerks' Office), another proper place (to be called his address for service), which shall not be more than three miles from the said office, where writs, notices, orders, summonses, warrants, and other documents, proceedings, and written communications, may be left for him (26th Oct. 1842; Ord. 20).

and address for service on pleadings.

Where indorsement of name and address for service is omitted.

(*i*) As to the effect of neglecting to indorse an address for service on the writ of *subpœna* issued under the old practice, see *Price* v. *Webb*, 2 Hare, 511, 513; from which case it would seem that in such a case the writ was not necessarily void, but the Court would in the meantime so deal with the proceedings by staying process or otherwise, as to give the party the benefit of this rule.

Rule 6. Where there is no address for service, service on party suing, &c., in person, to be personal, or at his place of residence.

6. Where a party sues or defends in person, and no address for service of such party shall have been written or printed pursuant to the directions of the 5th Rule of this Order, or where a party has ceased to have a solicitor, all writs, notices, orders, summonses, warrants, and other documents, proceedings, and written communications not requiring personal service upon the party to be affected thereby, shall, unless the Court shall otherwise direct, be deemed to be sufficiently served upon such party, if served upon him personally, or at his place of residence.

Where there is address for service to be at such address.

But if an address for service of such party shall have been written or printed as aforesaid, then all such writs, notices, summonses, warrants, and other documents, proceedings, and written communications, shall be deemed sufficiently served upon such party, if left for him at such address for service (26th Oct. 1842; Ord. 21).

Rule 7. Service on town solicitor of person not a party appearing in any proceeding, to be good service.

7. Where a person who is *not a party* (*k*) appears in any proceeding either before the Court or in chambers, service upon the solicitor in London, by whom such party appears, whether such solicitor act as principal or agent, shall be deemed good service, except in matters of contempt requiring personal service (*l*) (3rd April, 1828; Ord. 44).

(*k*) This rule does not apply to respondents to a charity petition, for they are held to be *parties* to it (*Re Willoughby's Charity*, 6 Sim. 18). But a creditor coming in to prove his debt in chambers is no party, and is within the rule (*Jennings* v. *Devey*, 4 Jur. 858). In cases not within the rule there must be a special application for substituted service, see note (*b*), p. 419, *post*.

(*l*) As to matters of contempt requiring personal service, see Ord. XXIII. 10, and notes, p. 489, *post*.

ORDER III. Solicitors and Parties acting in Person, and Service on them respectively.

Who may be served within the rule as *not being parties*.

Rule 8. Defendant who has not entered an appearance may be served with notice of motion, &c.

8. The plaintiff shall, without special leave of the Court, be at liberty to serve any notice of motion, or other notice, or any petition or summons, personally or at the dwelling-house or office of any defendant, who, having been duly served with a copy of the bill, shall not have caused an appearance to be entered within the time limited for that purpose (11th April, 1842; Ord. 3) (*m*).

(*m*) Where a defendant is out of the jurisdiction, this rule does not apply (*Green* v. *Pledger*, 3 Hare, 165).

Rule 9. Notice of appearance, answer, demurrer, plea, or replication, to be given the same day.

9. Where any solicitor or party causes an appearance to be entered, or an answer, demurrer, plea, or replication, to be filed, he shall, on the same day, give notice thereof to the solicitor of the adverse party, or to the adverse party himself, if he acts in person (26th Oct, 1842; Ord. 23) (*n*).

(*n*) When the plaintiff omitted to give notice of the filing of a replication till the day after it was filed, it was held that the proper course was not to move to take it off the file, but to move to enlarge the time for taking the next step in the cause (*Wright* v. *Angle*, 6 Hare, 107; but see *Johnson* v. *Tucker*, 15 Sim. 599, where the notice not having been given till five weeks after the replication was filed, the latter was ordered to be taken off the file; and comp. *Matthews* v. *Chichester*, cited in note (*r*), p. 448, *post*. *Wright* v. *Angle* was, however, followed in *Lloyd* v. *The Solicitors' Life Assurance Company*, 3 W. R. 640, where the notice had not been given till the fourth day after the replication had been filed. In this case V.-C. Wood, to discourage the practice of such summary applications on a mere slip, refused to give any costs. See also note (*c*), p. 455, *post*.

Proceeding when plaintiff neglects to give notice of filing replication.

Omission to give notice of the filing of an answer in pursuance of this rule does not deprive the defendant of his right to move to dismiss under Ord. XXXIII. 10 (*Jones* v. *Jones*, 3 W. R. 638; and see *Lowe* v. *Williams*, 12 Beav. 432).

Consequences of omission to give notice of answer.

As to giving notice of the filing of a replication to a defendant absconding or out of the jurisdiction, see cases cited in note (*e*) to Ord. XVII. 2, p. 462, *post*.

Rule 10. Solicitors signing petitions of rehearing, &c., on behalf of paupers, to be

10. Any solicitor signing any petition of rehearing or appeal, or any consent to a petition, or any notice of motion, or any proceeding or application to be made by a pauper, shall thereby become subject to all liabilities to

ORDER III. Solicitors and Parties acting in Person, and Service on them respectively.

which the sworn clerks were formerly subject in respect of such matters (26th Oct. 1842; Ord. 25) (*o*).

(*o*) See note to Ord. VII., 11, p. 406, *post*.

subject to liabilities.

Rule 11. Agreement by solicitor as to cause not to be binding unless reduced to writing.

11. No agreement between any solicitors relating to any of their clients' causes shall be capable of being enforced, unless and until such agreement, or some note or memorial thereof, be put into writing, and subscribed by the party who is to be bound thereby, or his solicitor (13th July, 1685. 19th July, 1697-8).

ORDER IV.

ORDER IV. Commissioners to administer Oaths in Chancery.

COMMISSIONERS TO ADMINISTER OATHS IN CHANCERY.

Time and place of taking affidavits, &c.

"The Commissioners to administer Oaths in Chancery in England" shall not, within ten miles of Lincoln's Inn Hall, take any affidavits, pleas, answers, disclaimers, or acknowledgments of deeds or recognizances, or do any other act incident to their office. And every such commissioner shall express the time when, and the place where, he shall take any affidavit, plea, answer, or disclaimer, or the acknowledgment of any deed or recognizance, otherwise the same shall not be held authentical, nor be admitted to be filed or enrolled. And in like manner every such commissioner shall express the time when, and the place where, he shall do any other act incident to his office (9th Oct. 1656. 22nd May, 1661; Sanders, 210. 21st Dec. 1833; Ord. 33) (*a*).

(*a*) See *ante*, p. 230, as to these commissioners.

ORDER V.

ORDER V. Official Attendance and Vacations.

OFFICIAL ATTENDANCE AND VACATIONS (*a*).

Rule 1—3 Offices when open.

1. The several offices of the court, except the offices of the Accountant-General and Taxing Masters, shall be open on every day of the year except Sundays, Good Friday, Monday and Tuesday in Easter week, Christmas

Day, and all days appointed by proclamation to be observed as days of general fast, humiliation, or thanksgiving (8th May, 1845; Ord. 5).

ORDER V. Official attendance and Vacations.

(*a*) As to time running during vacations, see notes to Ord. XXXIII. 13, p. 539, and XXXVII. 13, p. 570, *post*; and as to special applications in vacation, Ord. VI. 11, p. 397, *post*; and as to summonses, certificates, &c., during vacation, Ord. XXXV. 58, 59, p. 561, *post*.

Business, &c., in vacations.

2. The offices of the Accountant-General and of the Taxing Masters shall be open on every day of the year except the days specified in the 1st Rule of this Order, and except during vacations (8th May, 1845; Ord. 6).

3. The office of the vacation Taxing Master shall be open, during the vacations, on every day except the days specified in the 1st Rule of this Order (8th May, 1845; Ord. 7).

4. The vacations to be observed in the several offices of the Court, except in the office of the Accountant-General, are to be four in every year, viz., the Easter vacation, the Whitsun vacation, the Long vacation, and the Christmas vacation; and

Rule 4, 5. Vacations.

(1.) The Easter vacation shall commence and terminate on such days as the Lord Chancellor shall every year specially direct; Article (1).

(2.) The Whitsun vacation shall commence on the third day after Easter term, and terminate on the second day before Trinity term in every year; Article (2).

(3.) The Long vacation shall commence on the 10th day of August, and terminate on the 28th day of October in every year; Article (3).

(4.) The Christmas vacation shall commence on the 24th day of December in every year, and terminate on the 6th day of the following month of January; and Article (4).

(5.) The days of the commencement and termination of each vacation shall be included in and reckoned part of such vacation (8th May, 1845; Ord. 8) (*b*). Article (5).

(*b*) As to when the duties of the vacation judge commence, see *Francis* v. *Browne*, 10 W. R. 811, cited note (*i*), p. 398, *post*.

Vacation judge.

ORDER V. Official Attendance and Vacations.

5. The vacations in the office of the Accountant-General shall be the same as in the other offices, except as to the Long vacation, which, in that office, shall commence and terminate on such days as the Lord Chancellor shall every year direct (8th May, 1845; Ord. 9).

Rule 6. Lord Chancellor may vary vacation.

6. The Lord Chancellor may, from time to time, by special order, direct the offices to be closed on days other than those mentioned in the 1st Rule of this Order, and direct any of the vacations to commence and terminate on days different from the fixed days mentioned in the 4th Rule of this Order (8th May, 1845; Ord. 10) (*c*).

Offices closed.

(*c*) As to the effect of the offices being closed on pending applications, see *Flowers* v. *Bright*, 2 J. & H. 590, cited p. 570, *post*.

ORDER VI. Selection of Court.

ORDER VI.

SELECTION OF COURT (*a*).

Rule 1. How bills are to be marked.

1. Every original bill to be filed in the High Court of Chancery shall (at the option of the plaintiff) be distinctly marked, at or near the top or upper part thereof, either with the words "Lord Chancellor," or with the words "Master of the Rolls;" and if with the words "Lord Chancellor," then also with the name of one of the Vice-Chancellors for the time being, at the option of the plaintiff. And the Record and Writ Clerks shall, in the books and indexes in which the same shall be entered, add to the entry thereof such distinguishing words or mark as may make it appear from such entry whether the bill is marked with the words "Lord Chancellor," or with the words "Master of the Rolls," and if with the words "Lord Chancellor," then for which of the Vice-Chancellors the same is marked. And the cause (unless *removed by some special order* (*b*) of the Lord Chancellor or Lords Justices) shall accordingly be attached to the court of the Master of the Rolls, or to the court of such Vice-Chancellor, as the case may be. And the Record and Writ Clerks shall not

file any original bill which shall not be marked in the manner hereinbefore directed (5th May, 1837; Ord. 1. 29th Oct. 1851).

ORDER VI. Selection of Court.

(*a*) Where two suits for the same object are instituted in different branches of the court, application should generally be made to stay proceedings in one. (As to the *plea* of a *former suit depending*, see note (*k*), *post*, p. 446 ; Daniell, 583.)

Same suit instituted in two branches of the Court.

(1) If the suits are identical in object, the proceedings in one will be stayed unconditionally, and the cause carried on in the other, *Golder* v. *Golder*, 9 Hare, 276 ; *Underwood* v. *Jee*, 1 M. & G. 276 ; *Portarlington* v. *Damer*, 2 Phill. 262 ; *Jackson* v. *Leaf*, 1 J. & W. 229 ; and the same rule applies to petitions, *Re Browse*, 14 W. R. 298.

(1) If objects are identical, proceedings may be stayed in one branch, and the conduct given to the plaintiff in the other.

In selecting the court in which the cause shall be carried on, the general rule adopted is that the cause will be carried on in the suit where a decree was first made ; but this rule is subject to exceptions, *e. g.* where the plaintiff in the later suit has a better right to the carriage of the suit. Thus, the suit instituted by a mother, has been preferred to other relations, though they had priority, *Harris* v. *Lightfoot*, 10 W. R. 31, and a person beneficially interested in preference to a creditor (*Penney* v. *Francis*, 9 W. R. 8 ; *Kelk* v. *Arthur*, 16 Jur. 605 ; see *Belcher* v. *Belcher*, 2 Dr. & Sm. 444), without respect to priority of decree. So where priority has been unfairly obtained, *Harris* v. *Gandy*, 1 D. F. J. 13 ; *Belcher* v. *Belcher*, 13 W. R. 913 ; *Frost* v. *Ward*, 2 D. F. J. 70, and cases cited, *infra*. As to inquiries in chambers where infants are concerned, see Daniell, 73.

Conduct of cause.

If two decrees have been made in different branches of the court, the transfer will, in the absence of special circumstances, be made to the branch where the fullest and most perfect decree has been made, *Littlewood* v. *Collins*, 11 W. R. 387 ; and see *Corser* v. *Jones*, 14 W. R. 704. And as to the conduct of decrees where two suits have been instituted in the same court, and generally, see note (*f*), p. 147, *ante*.

Course when two decrees have been made.

The dismissal of the suit stayed will be without costs if there was no impropriety in its institution, *Brooksbank* v. *Higginbotham*, 31 Beav. 35, but otherwise with costs, *Salter* v. *Tiddesly*, 13 W. R. 376; *Whittington* v. *Edwards*, 3 De G. & J. 243 ; and so where a second petition for payment of money out of court was improperly presented, *Re Chaplin*, 3 N. R. 289.

Two petitions.

The rule applies equally where one suit for administration has been instituted by bill and another by summons. The proceedings instituted by bill will be stayed, *if the same decree can be made on the summons as on the bill*, *Ritchie* v. *Humberstone*, 22 L. J. Ch. 1006 ; *Penney* v. *Francis*, 9 W. R. 8 ; *Thompson* v. *Thompson*, 11 W. R. 797 ; *Whittington* v. *Edwards*, 3 De G. & J. 243; and see *Pigott* v. *Young*, 7 W. R. 235, where a suit instituted by claim was adjourned into chambers.

Suit and summons.

As to staying proceedings in the Duchy Court of Lancaster, see *Wynne* v. *Hughes*, 26 Beav. 377, *Bradley* v. *Stelfox*, 1 N. R. 221.

Duchy Court.

And as to staying suits in the Court of Chancery, because the matter in litigation can be more effectually disposed of in a foreign court, see Ayckbourn, 337 ; *Pieters* v. *Thompson*, Cooper, 294.

Foreign Court.

(2) Where the objects of the two suits are similar, but one will effect more than the other, the Court will not stay the proceedings as a matter of course in either of the suits, unless one of them has been instituted with a view to snatching a decree, see *infra*.

(2) If one suit will effect more than the other, proceedings need not be stayed.

For example, it has been held that a decretal order on an administration summons was no answer to a suit embracing matters which could not be included in that decree, *Rump* v. *Greenhill*, 20 Beav. 512 ; and see note (*p*), p. 203, as to the limited order which can be made on summons.

But even in such cases, if it is desirable to *amalgamate* the two suits, the Court will do so on conditions.

There may be amalgamation.

Thus, where two suits were instituted for administration the Court stayed

ORDER VI. Selection of Court.

proceedings in the second suit, although it prayed additional relief, on the defendant in the first suit undertaking not to offer opposition to any matters not covered by the original decree which the judge in chambers might think fit to add thereto (*Gwyer* v. *Peterson*, 26 Beav. 83 ; *Matthews* v. *Palmer*, 11 W. R. 610) ; and in another case, instead of staying proceedings in the second suit, the Court ordered the two suits to be consolidated, and the inquiries directed by the first decree to be extended, *Hoskins* v. *Campbell*, 2 H. & M. 43.

Special order on amalgamating two suits.

A creditor, plaintiff in an administration suit, whose suit was stayed on the ground of a decree embracing the same objects in another suit instituted by executors, was held to be entitled to a discovery of the assets from the executor, *Macrae* v. *Smith*, 2 K. & J. 411 ; see *Lankester* v. *Wood*, 14 L. T. N. S. 512.

In another case the Court stayed proceedings in the second suit only so far as the first suit gave identical relief, *Dryden* v. *Foster*, 6 Beav. 146. Compare *Piffard* v. *Vanrenan*, 13 W. R. 425 (cited *infra*) ; and for a case of consolidation of a large number of suits, see *Foxwell* v. *Webster*, 2 Dr. & Sm. 257 note, 12 W. R. 186.

(3) If second suit unfair and unnecessary though not identical, the first cause may be hastened.

(3). But the Court will stay a suit though not identical, if it is unfairly and unreasonably instituted, *e.g.*, where plaintiffs in a second administration suit obtained a decree without mentioning to the Court that another suit had been instituted, *Harris* v. *Lightfoot*, 10 W. R. 31.

So where an administration suit instituted by bill has been pending, and a party has without good reason attempted to gain priority by taking out a summons, the first cause has been hastened to prevent him, *White* v. *Lyon*, 4 N. R. 221 ; and see remarks by V.-C. Malins, in *Tulloch* v. *Tulloch*, 2 L. R. Eq. 574, 576 ; *Furze* v. *Hennett*, 2 De G. & J. 125 ; *Harris* v. *Gandy*, 1 D. F. J. 13 ; and compare the cases on last page, as to giving the conduct of the cause to the plaintiff in the second suit, when priority has been unfairly obtained.

But see *Piffard* v. *Vanrenan*, 13 W. R. 425, where the bill charged an executor with fraud, and the executor, after appearing to the bill, took out an administration summons and obtained the usual order, and V.-C. Stuart refused to discharge the order, and said that the accounts might be taken and the residue ascertained, subject to the reservation of the question raised by the bill.

Application to stay proceedings in one of two suits, how made ;

The proper course in making the application is to move before the Lord Chancellor or Lords Justices to transfer the cause, and then apply to the judge in whose court proceedings are to be stayed by motion, to stay proceedings, *Duffort* v. *Arrowsmith*, 7 D. M. G. 434 (overruling *White* v. *Johnson*, 2 Phil. 689) ; *Ladbrooke* v. *Bleaden*, 15 Beav. 457. So where there has been a decree in both suits, *Scott* v. *Stone*, 22 L. J. Ch. 911. See, too, *Bryson* v. *Warwick and Napton Canal Company*, 18 Jur. 893.

by whom and when.

The personal representative should apply as soon as a decree has been made in one suit. But if he neglects, the plaintiff who first obtained the decree should apply. If no one interested applies, the Court itself will make the application, *Swale* v. *Swale*, 22 Beav. 401.

Notice.

One clear day's notice of an application to transfer a cause must be given to the other side, *Sidebottom* v. *Sidebottom*, 7 W. R. 104. And where one of the defendants had neither consented nor been served, the application was refused, though all the other parties concurred, *Bond* v. *Barnes*, 2 D. F. J. 387.

Form of order.

For form of order, see Seton, 887 ; and as to the costs in the suit which is stayed, see *ibid*, 888.

Transfer of causes.

(*b*) Where two bills which, though not strictly cross bills, are clearly in the nature of cross bills, are filed in different courts, the second suit will be transferred to the court in which the first bill was filed, *Merchant Banking Company* v. *Maud*, 15 W. R. 886.

Re-transfer of causes.

Where a cause has been transferred by general order from one court to another, a re-transfer will not, without consent, be ordered where it will delay the hearing. Where it will not cause delay, the Court will give weight to the fact that the judge from whose court it has been transferred has by means of interlocutory applications gained an acquaintance with the facts, *Platt* v. *Walker*, 1 L. R. Ch. 471 ; but it will not take into consideration that such judge has decided a similar point in another case, *Wilson* v. *Gray*, 14 W. R. 783.

Generally, on applications for a transfer of a cause the Court will consider the probability of convenience, *Carlewis* v. *Whidborne*, 10 W. R. 261.

ORDER VI. Selection of Court.

As to applications for re-transfer, see *Wilson* v. *Gray*, (l. c.); and *Tiffin* v. *Parker*, 12 W. R. 698, where the applications were unsuccessful.

The Court will not allow a suit to be transferred where any one of the defendants has not consented, and has not been served with notice of the application, *Bond* v. *Barnes*, 2 D. F. J. 387.

Convenience. Notice of application.

2. The Record and Writs Clerk to whom it belongs to give or sign the certificate that a cause is ready for hearing, shall, upon being applied to for such certificate, see that the same certificate is marked, or cause the same to be marked, with the designation of the judge to whose court the cause is attached (5th May, 1837; Ord. 2. 11th Nov. 1841; Ord. 2).

Rule 2. How Record and Writ Clerk's certificate to be marked.

3. The Registrars shall not set down to be heard any cause in which the certificate of the cause being ready for hearing shall not be marked in the manner hereinbefore directed (5th May, 1837; Ord. 4).

Rule 3. Causes not to be set down unless certificate be marked.

4. Unless otherwise directed by any special order of the Lord Chancellor or the Lords Justices, every plea or demurrer and all exceptions in any cause shall be set down to be heard before the judge to whose court the cause is attached, and every cause shall be set down to be heard in conformity with the manner in which the certificate of the same being ready for hearing is marked as hereinbefore directed (5th May, 1837; Ord. 6) (*c*).

Rule 4. Pleas, demurrers, exceptions, and causes to be set down before judge to whose court cause attached.

(*c*) An order irregularly obtained must be properly discharged, and cannot be treated as a nullity. See Daniell, 745; *Wilkins* v. *Stevens*, 10 Sim. 617; *Blake* v. *Blake*, 7 Beav, 514; *Fennings* v. *Humphery*, 4 Beav. 1; *Chuck* v. *Cremer*, 2 Ph. 113. See note to Ord. IX. 12, p. 413, *post*.

Irregular order not a nullity.

As to the costs of an irregular proceeding, see next note.

5. Save as hereinafter provided, all motions, petitions, rehearings otherwise than by way of appeal, and further proceedings in causes shall be had before the judge to whose court such causes are or shall be attached (*d*), unless removed therefrom by any special order of the Lord Chancellor or the Lords Justices (5th May, 1837; Ords. 9 & 12. 11th Nov. 1841; Ord. 5. 29th Oct. 1851; Ord. 7) (*d*).

Rule 5. Motions, petitions, rehearings and further proceedings to be set down before judge to whose court cause attached.

(*d*) An application to tax a solicitor's bill need not necessarily be made in the court where the business was done, see note (*l*), p. 17, *ante*.

What applications may be made in another Court.

See also note (*f*) to next section, and *Earl of Shrewsbury* v. *Trappes*, cited, note (*l*), p. 398, *post*.

ORDER VI. Selection of Court.

But it was held by V.-C. Shadwell that he had no right, to order even a fund standing in trust in a Lord Chancellor's cause to be transferred to a Rolls cause (*Wright* v. *Irving*, 10 Sim. 625; see, too, *Hooper* v. *Paver*, 6 Beav. 173).

Orders affecting other branches of the Court.

If a notice of motion has been irregularly given before the wrong Court, that Court has jurisdiction to make the applicant pay the costs (*Yearsley* v. *Yearsley*, 19 Beav. 1).

Rule 6. Notices of motions and petitions not in any cause, and petitions and motion papers, under Stat. 13 & 14 Vict. c. 35, s. 19, and orders thereon, are to be marked in same manner as bill.

6. Every notice of motion not in any cause, and every petition not in any cause, and every petition or motion paper under the Stat. 13 & 14 Vict. c. 35, s. 19, shall be marked at or near the top or upper part thereof, in the same manner as a bill is now marked, with the name of the Lord Chancellor and one of the Vice-Chancellors, or with the name of the Master of the Rolls; and every order made thereon shall be marked in the same manner as the said notice of motion, petition or motion paper; and the *matter* in which such order is made shall thenceforth be considered as attached to the court of the judge whose name shall be so marked upon such order (*e*) in like manner and for the like purpose as causes are attached to such court, but shall be subject to be transferred from such court in the same manner as causes are so transferred; and the provisions of the 5th and 11th Rules of this Order shall apply to every matter so attached (2nd Nov. 1850; Ord. 27. 11th Nov. 1841; Ord. 6. 5th May, 1837; Ord. 16. 29th Oct. 1851; Ord. 7) (*f*).

Vacation.

(*e*) Notwithstanding this rule any Vice-Chancellor may hear a motion or petition for another, who has risen for the vacation (Rule 11 and note).

What applications may be made *out of* court to which the matter is attached.

(*f*) In the following cases it has been held that applications need not be made to the judge to whose court the *matter* is attached.

Where an order was made for new trustees of a charity, it was held not to be necessary that all subsequent applications for appointment of new trustees should be made to the judge who had made the first order, *Re Watts' Charities*, 30 Beav. 404; and the same was held where the applications were for the payment of dividends on sums paid into court in the matter of a private Act of Parliament, *Re Bilston Curacy*, 10 W. R. 516; reluctantly followed by V.-C. Wood in *Re Hayber's Trust*, *ibid.* 557; but see *contra*, *Re Browse*, 14 W. R. 298.

Rule *7. Vice-Chancellor ceasing to hold his office.

*7. Upon any Vice-Chancellor for the time being ceasing to hold his office, any cause or matter which shall then be attached to the Court of such Vice-Chancellor shall, unless removed by any special order of the Lord Chancellor or Lords Justices, thenceforth be attached to the

court of his successor, as Vice-Chancellor for the time being.

ORDER VI. Selection of Court.

8. The Registrars shall keep distinct lists of the causes and other matters set down to be heard before each judge (11th Nov. 1841; Ord. 7).

Rule 8. Registrars to keep list of causes, &c.

9. All applications for orders of course to be obtained on petition or motion shall and may be made in the same manner, in all respects, as if the above Rules of this Order had not been made (*g*) (5th May, 1837; Ord. 14).

Rule 9. Orders of course.

(*g*) See Ord. XXIII. 17, p. 492, *post*. A motion of course in a cause attached to one Vice-Chancellor's Court may be made to another Vice-Chancellor (*Magan* v. *Magan*, 16 Jur. 587).

10. Applications to discharge, reverse, or alter any order made on motion or petition of course by the Lord Chancellor, the Lords Justices, the Master of the Rolls, or one of the Vice-Chancellors, shall be made to the judge to whom special applications in the cause or matter in which such order is made, ought to be made (2nd Nov. 1850; Ord. 26) (*h*).

Rule 10. Applications to discharge, reverse, or alter orders of course.

(*h*) See 13 & 14 Vict. c. 35, s. 29 (page 131, *ante*). Therefore on an application to the Master of the Rolls to discharge a Rolls order of course made in a Vice-Chancellor's cause, the Court will not look to the merits except so far as to enable it to judge of the regularity of the order (*St. Victor* v. *Devereux*, 6 Beav. 584; *Hooper* v. *Paver*, *ibid.* 173; *Arnold* v. *Arnold*, 9 Beav. 206).

Application to discharge Rolls order of course in a V.-C.'s cause.

But when the question is simply one of *irregularity*, the Master of the Rolls will entertain it (*Marquis of Hertford* v. *Suisse*, 7 Beav. 160).

On question of irregularity.

Otherwise, if it goes to the merits of the case, it will be dismissed with costs, *Cooper* v. *Knox*, 15 Beav. 102.

On question of merits.

In order to give a Vice-Chancellor jurisdiction to discharge or vary a common order for *taxation of costs* made by the M. R. in such V.-C.'s cause, the petition must be entitled in the suit, and not merely "in the matter of A. B. a solicitor," *Re Bell*, 2 H. & M. 501.

When not entitled in cause

11. In the interval between the close of the sittings after any term and the commencement of the sittings before or at the beginning of the next ensuing term, applications for special orders may be made to any judge of the court in the same manner as if the above rules of this Order had not been made (*i*); but the orders which shall be made in any such interval by the Lord Chancellor or the Lords Justices, or by the Master of the Rolls, or by any of the Vice-Chancellors, shall,—if not made by the judge to whom the application, if made during the

Rule 11. Special orders during vacations.

ORDER VI. Selection of of Court.

ordinary sittings of the Court, would have been made pursuant to the directions contained in this Order,—be marked as having been made for such judge, and shall in the future proceedings of the cause be deemed to be the order of such judge, in all respects, save this,—that no order so made by one judge for another, under the circumstances aforesaid, shall be re-heard for the purpose of being discharged or varied, otherwise than by the Lord Chancellor or the Lords Justices (5th May, 1837; Ord. 15. 5th Aug. 1842) (*k*).

Rehearing same.

Vacation judge.

(*i*) The jurisdiction of the vacation judge to hear applications in causes pending in any of the courts, commences when that court rises for the vacation, though it may have risen before the time provided by Ord. V. 4, for the commencement of the vacation, *Francis* v. *Browne*, 10 W. R. 811.

(*k*) See *Holloway* v. *Phillips*, 22 L. J. Ch. 1091; *Price* v. *Gardner*, 1 Jur. N. S. 975; *Bean* v. *Griffith*, *ibid.*, 1045; *Man* v. *Ricketts*, 9 Beav. 4.

Rule 12. Applications to stay proceedings on decree or order appealed from.

12. Every application to stay proceedings (*l*) upon any decree or order which is appealed from, shall be made first to the judge who pronounced the decree or order (3rd April, 1828; Ord. 46).

Application where made to the Appeal Court.

(*l*) See note (*d*), p. 522, *post*, as to motions to stay proceedings pending an appeal. This rule is not invariable; thus, where a plaintiff's bill to restrain the defendant from taking proceedings on a judgment at law had been dismissed, and he appealed, he was allowed to move before the Court of Appeal that the defendant might be restrained from putting his judgment in force until the petition of rehearing should have been disposed of, *Earl of Shrewsbury* v. *Trappes*, 2 D. F. J. 172.

Rule 13. New trial of issue.

13. Every application for the new trial of any issue or question of fact directed by a judge of this court to be tried at law, shall be first made to the judge who directed such issue or question of fact to be so tried (3rd April, 1828; Ord. 47) (*m*).

(*m*) See as to new trials of issues, note (*k*), p. 267, *ante*.

ORDER VII. Parties, Persons under Disability, and Paupers.

ORDER VII.

PARTIES, PERSONS UNDER DISABILITY, AND PAUPERS.

I. *Parties Generally.*

Rule 1. Heir at law unnecessary

1. In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the

plaintiff shall be at liberty to make the heir at law a party, where he desires to have the will established against him (26th Aug. 1841; Ord. 31) (*a*).

ORDER VII. Parties, Persons under Disability, and Paupers.

(*a*) See as to the practice before this rule, Daniell, 225, and see *Shakels* v. *Richardson*, 2 Coll. 31; *Burch* v. *Coney*, 14 Jur. 1109; *Weeks* v. *Evans*, 7 Sim. 546, for the present practice of administering real assets in the absence of the heir.

party to suits to execute trusts of will.

Heir not necessary party to administration of real estate.

2. (*b*) Where the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable (26th Aug. 1841; Ord. 32).

Rule 2. Parties jointly and severally liable as principals or sureties.

(*b*) The rule applies where the amount is ascertained; thus in *Perry* v. *Knott*, 5 Beav. 293, it was held by Lord Langdale, that a *cestui que trust*, seeking to make one of several trustees liable for a breach of trust, need not make the other trustees parties. See, too, *Strong* v. *Strong*, 18 Beav. 408; *Norris* v. *Wright*, 14 Beav. 291 (where the presence of the assignees of bankrupt trustees was dispensed with); *Attorney-General* v. *Pearson*, 2 Coll. 581; *Attorney-General* v. *Corporation of Leicester*, 7 Beav. 176, which was the case of a charity information; *Kellaway* v. *Johnson*, 5 Beav. 319; *Bateman* v. *Margerison*, 6 Hare, 496; *Masters* v. *Barnes*, 2 Y. & C. C. C. 616.

One trustee may be made liable for breach of trust separately from co-trustee.

These cases seem at first sight opposed to *Lenaghan* v. *Smith*, 2 Ph. 301; *Lewis* v. *Allen*, 8 W. R. 603; *Fussell* v. *Elwin*, 7 Hare, 29 (where on the bankruptcy of one defendant trustee the suit had to be revived against his assignees), *Phillipson* v. *Gatty*, 6 Hare, 26; *Fowler* v. *Reynal*, 2 De G. & Sm. 749; *Shipton* v. *Rawlins*, 4 Hare, 619, where under somewhat similar circumstances the absent trustees, or their representatives, were held to be necessary parties; see note to *Devaynes* v. *Robinson*, 24 Beav. 86; *Richardson* v. *Hastings*, 7 Beav. 301; and see *Macgachen* v. *Dew*, 15 Beav. 84; where, however, the circumstances were peculiar, the breach of trust having been committed by *two classes of trustees*, and the Court holding that the *cestui que trust* might proceed against one class separately; but the distinction is that where a *general* account and *general* administration is sought, or may be involved in the suit, all the trustees must be parties; but where trustees are sought to be made liable for an *ascertained* amount, the general order applies, *Coppard* v. *Allen*, 2 D. J. S. 173; *Chancellor* v. *Morecraft*, 11 Beav. 262; *Biggs* v. *Penn*, 4 Hare, 469; *Hall* v. *Austen*, 2 Coll. 570; *Penny* v. *Penny*, 9 Hare, 39.

Unless the suit will lead to a general administration.

But the personal representative of an executor or trustee who has never acted or received assets was not, even before the rule, a necessary party to a suit for administration of the estate (see Williams on Executors, p. 1860; and *Pitt* v. *Brewster*, Dick, 37; and comp. *Masters* v. *Barnes*, l. c., with *Hall* v. *Austen*, l. c., and *Holland* v. *Prior*, 1 M. & K. 237, where the executor had both acted and received assets).

Where co-trustee never acted.

As to the necessity of making *cestuis que trusts*, or other persons involved, parties to a suit against a trustee in respect of a breach of trust, see *Lund* v. *Blanshard*, 4 Hare, 9, and note (*e*), p. 198, *ante*, and compare *Williams* v. *Allen*, 29 Beav. 292, where the *cestuis que trusts* being dead, administration to their estates limited to the purposes of the suit was, in such a case, held sufficient; see the case on appeal, 10 W. R. 512.

When cestuis que trusts should be parties.

ORDER VII. Parties, Persons under Disability, and Paupers.

The rule does not allow a partnership debt to be recovered against one partner's representative without making a surviving partner a party, *Hills* v. *M'Rae*, 9 Hare, 297; *Cox* v. *Stephens*, 2 N. R. 596; but see, *Haig* v. *Grey*, 3 De G. & Sm. 741; *Thorpe v. Jackson*, 2 Y. & Coll. Ex. 553.

Case of partnership. Principal and surety.

It seems that a plaintiff may not sue a surety under this order in the absence of his principal or co-surety (*Lloyd* v. *Smith*, 13 Sim. 457; *Pierson* v. *Barclay*, 2 De G. & Sm. 746; *Allan* v. *Houlden*, 6 Beav. 148; but see *Wilson* v. *Goodman*, 4 Hare, 63). See further, as to parties in respect of joint and several demands, *MacIntyre* v. *Connell*, 1 Sim. N. S. 252; *Mayor of Berwick* v. *Murray*, 5 W. R. 208; *Colby* v. *Hawkins*, 6 Jur. 162; and Daniell, 258.

II. *Infants (c) and Persons of Unsound Mind (d).*

Rule 3. Default in appearing or answering by an infant or person of unsound mind not found so by inquisition. Solicitor assigned as guardian.

3. Where, upon default made (*e*) by a defendant in not appearing to or not answering a bill, it appears to the Court that such defendant is an infant or a person of weak or unsound mind, not so found by inquisition, so that he is unable of himself to defend the suit, the Court may, upon the application (*f*) of the plaintiff, order that one of the solicitors of the court (*g*) be assigned guardian of such defendant, by whom he may appear to and answer or may appear to or answer the bill and defend the suit.

But no such order shall be made unless it appears to the Court, on the hearing of such application, that a copy of the bill was duly served in manner provided by the Stat. 15 & 16 Vict. c. 86, and that notice of such application (*h*) was, after the expiration of the time allowed for appearing to or for answering the bill, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such copy of the bill, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of the father or guardian of such infant (*h*), unless the Court, at the time of hearing such application, shall dispense with such last-mentioned service (*i*) (8th May, 1845; Ord. 32; and Ord. 16, Art. 48).

Next friends.

(*c*) As to next friends of infant and married women plaintiffs, and the security for costs required of them, see note (*t*), p. 166, *ante*; and as to applying in chambers for appointment of next friends, see note (*f*), p. 148, *ante*.

As to parties under disability consenting by next friends, &c., to modes of procedure, see Ord. 5th Feb. 1861, r. 24, *post*.

As to costs of next friends, see Morgan & Davey, 248; *Re Wills*, 12 W. R. 97. A guardian *ad litem* is not liable for costs, except in case of gross misconduct, *Morgan* v. *Morgan*, 11 Jur. N. S. 233.

Consent to procedure.

See Ord. X. 5 (p. 422), *post*, as to the invalidity of an appearance by the plaintiff for an infant defendant. The Court will only make the order if it is satisfied that no relative will undertake the defence (*Moore* v. *Platel*, 7 Beav. 583; and see *Foster* v. *Cautley*, 10 Hare, App. xxiv., and *Anon.*, 9 Hare, App. xxvii., and *post*, note (*f*).

Guardian not liable for costs.

A commission is not now necessary to appoint a guardian *ad litem* of an infant within the jurisdiction, *Egremont* v. *Egremont*, 2 D. M. G. 730.

Infant abroad.

The rule applies to infants residing abroad, see note (*i*), *infra*, and to infant married women, see note to *Colman* v. *Northcote*, 2 Hare, 148.

Married infant.

Administration summons.

The rule applies to administration suits instituted by summons in chambers, *Osbaldiston* v. *Crowther*, 1 Sm. & Giff. App. xii.; 1 W. R. 255; and to a special case, see pp. 118, 119, and to petitions, *Re Duke of Cleveland's Harte Estates*, 1 Dr. & Sm. 46; *Re Ward*, 2 Giff. 123; *Re Barrington*, 27 Beav. 272; but an affidavit of personal service of a petition on an infant respondent was required in *Re Willan*, 9 W. R. 689, and in some cases it has been held that infant respondents to petitions need not be served, nor appear, see note (*h*), p. 109, as to petitions under the Trustee Acts.

Petition.

Lunatic in contempt.

(*d*) Lunatics attached for contempt in not answering (see note (*a*), p. 433, *post*), may have guardians assigned them by 1 Will. 4, c. 36, s. 15, r. 9.

The rule applies to lunatic respondents to petitions, *Re Greaves*, 2 W. R. 335, and see last note.

Person in weak health.

A guardian *ad litem* will not be appointed to a person merely because he is in weak health (*Willyams* v. *Hodge*, 1 M. & G. 516). In an old case where the defendant's competency was disputed, an inquiry was directed (*Lee* v. *Ryder*, 6 Madd. 294). In the case of a lunatic found so by inquisition (whose case is not within this rule) the committee will be appointed guardian as of course (Daniell, 172). If the committee have an adverse interest another guardian will be appointed (*Worth* v. *Mackenzie*, 3 M. & G. 363).

Of great age.

A person of great age and incapable of giving a continuous attention to business, may be ordered to defend by guardian *ad litem*, *Newman* v. *Selfe*, 11 W. R. 764; *Steel* v. *Cobb*, *ibid.* 298.

Order discharged on lunatic's recovery.

A lunatic defendant may move to discharge the order on his recovery, and should do so, or he will be liable for the costs of the solicitor appointed his guardian, *Frampton* v. *Webb*, 11 W. R. 1018.

(*e*) As to making the order, though there has been no default, see *Bentley* v. *Robinson*, cited in note (*h*), *infra*.

Application by motion of course.

(*f*) The application is by motion, and the order may be obtained of course, *Re Barrington*, 27 Beav. 272, and where a guardian had not been appointed at the hearing of a petition, the Court made the order as prayed, subject to the appointment of a guardian, and directed that the order on the petition should be dated after the order appointing the guardian (*Re Cooper's Settlement*, 9 W. R. 531, V.-C. S.).

What person appointed.

(*g*) The Court nominates the solicitor (see *Thomas* v. *Thomas*, 7 Beav. 47; *Biddulph* v. *Camoys*, 9 Beav. 548; *Sheppard* v. *Harris*, 15 L. J. Ch. 104). In general the solicitor to the suitor's fund will be appointed (*ibid.*; and *M'Kerrakin* v. *Cort*, 7 Beav. 347), but the rule is not the same when the application is made by the defendant's family, in which case any suitable person may be appointed (*Charlton* v. *West*, 3 D. F. J. 156; and see *Moore* v. *Platel*, 7 Beav. 583; *Biddulph* v. *Dayrell*, 15 L. J. Ch. 320, where the wife's solicitor was appointed guardian *ad litem* of her husband, a lunatic defendant, on proof that the husband had no adverse interest; and *Leese* v. *Knight*, 10 W. R. 711, where a mother who had made a claim to dower adverse to her children, was required to make a special application to be appointed their guardian *ad litem* (though she had already been appointed by a common order). See, too, *Anon.*, 9 Hare, xxvii., where it was said the Court would prefer some adult and competent person, having no adverse interest, rather than a solicitor or other stranger. But the guardian must be resident within

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the jurisdiction (*Anon.*, 18 Jur. 770). And a person under disability will not be appointed, nor the plaintiff in the suit. But there is no objection to appointing a defendant who has not a conflicting interest. A guardian appointed in an original suit may act in a supplemental or revived suit without further order (*ibid.*).

No adverse interest.

A lunatic's brother who was a co-defendant, and had no adverse interest was appointed his guardian *ad litem* in *Bonfield* v. *Grant*, 10 W. R. 275. See *Sandford* v. *Sandford*, 11 W. R. 336; *Gee* v. *Gee*, 12 W. R. 187.

Service of notice, on person under whose care the infant resides.

(*h*) Where the notice was served at the house of the mother of the infants and her second husband, the father being proved to be dead, such service was held to be a sufficient service within the terms of the rule (*Hitch* v. *Wells*, 8 Beav. 576; see, too, *Baker* v. *Holmes*, Dick. 18; *Thompson* v. *Jones*, 8 Ves. 141; *Lane* v. *Hardwick*, 5 Beav. 222). So where the infant defendants were concealed in their mother's house to avoid service, it was held that putting a copy of the subpœna under the door of the mother's dwelling-house was good service (*Clark* v. *Waters*, Smith's Ch. Pr., p. 253). In another case service on the rector of the college of which the infant was an undergraduate member, was held sufficient, the plaintiff being unable to discover where his father lived (*Christie* v. *Cameron*, 4 W. R. 589). But service on the uncle of an infant, not being his guardian is improper (*Blackmore* v. *Howett*, 30 L. T. 101); and where the infant was articled to, and resident with, a surgeon, and it appeared from the affidavit that the notice was served upon him while so residing, but it did not state that the notice was served either personally upon or at the dwelling-house of the surgeon, the service was held insufficient (*Taylor* v. *Ansley*, 9 Jur. 1055); see as to substituting service, note to Ord. X. 2, p. 419, *post*, and cases there cited. Where a defendant is of unsound mind, and confined in an asylum, the Court will, on proof that on service of the bill on her she was made aware of the general nature of the claim against her, appoint her a guardian under this rule (*Elliston* v. *Sheldrake*, 2 L. T. N. S. 48).

Where no default.

Where the infant has not made default in appearing or answering, the order may be made (but see *Saunders* v. *Walter*, 2 H. & T. 199), upon service on the solicitor by whom he has appeared (*Bentley* v. *Robinson*, 9 Hare, App. lxxvi.; and see *ibid.*, xxvi. xxvii.; *Cookson* v. *Lee*, 15 Sim. 302. Where

Death of guardian.

the guardian dies, a special application for the appointment of a new one becomes necessary (*Needham* v. *Smith*, 6 Beav. 130).

As to appointment of a guardian *ad litem* before this rule, see *Brooks* v. *Jobling*, 2 Hare, 155; *Howlett* v. *Wilbraham*, 5 Mad. 423.

(*i*) Sunday is reckoned as one of the six days (*Brewster* v. *Thorp*, 11 Jur. 6; and see now Ord. XXXVII. 10, *post*).

Infants residing abroad.

Though the rule applies to infants residing abroad (*O'Brien* v. *Maitland*, 10 W. R. 275; *Anderson* v. *Stather*, 10 Jur. 383); yet where an infant defendant, having no substantial interest in the suit, was abroad, the Court dispensed with service of notice of the application, *Lambert* v. *Turner*, 10 W. R. 335; *Turner* v. *Sowden*, 2 Dr. & S. 665; see *Chaffers* v. *Baker*, 5 D. M. G. 482; *Lingren* v. *Lingren*, 7 Beav. 66; and, generally, where service cannot be effected under this rule, the Court may order the bill to be amended by striking out the name of the infant, saving just exceptions, *Blackmore* v. *Howett*, 30 L. T. 101. Compare note (*h*), p. 109, *ante*.

Rule 4. Plea or answer of infant sworn by guardian.

4. Where a plea and answer or a plea or answer severally shall be brought to be sworn by the guardian of an infant, the same shall not be sworn until the order appointing such guardian shall be produced to the person before whom the same shall be sworn (*j*) (25th Oct. 1699).

Answer, &c., signed, &c., by guardian.

(*j*) The plea or answer is signed and sworn to by the guardian and not by the infant (*Wrottesley* v. *Bendish*, 3 P. Wms. 237, and for that reason cannot be read against the infant (*ibid.*).

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Rule 5. Service of notice of decree or order, under 15 & 16 Vict. c. 86, s. 42, in case of infants or persons of unsound mind.

5. Where any person required to be served with notice of a decree or order, pursuant to the 8th rule of the 42nd section of the Stat. 15 & 16 Vict. c. 86, is an infant or a person of unsound mind not found so by inquisition, the notice shall be served upon such person or persons and in such manner as the judge to whose court the cause is attached may direct (*k*) (1st June, 1854; Ord. 5).

(*k*) See p. 196, *ante*, and note (*b*), p. 197, and 7th Regul. as to business, Aug. 1857, Appendix, p. liv., *post*.

Direction as to service.

Rule 6. Appointment of guardians ad litem to be served with notice of decree or order.

6. Guardians *ad litem* appointed for infants or persons of unsound mind not found so by inquisition, who shall be served with notice of any decree or order, shall be appointed in like manner as guardians *ad litem* to answer and defend are appointed in suits on bills filed (*l*) (1st June, 1854; Ord. 6).

(*l*) See notes to r. 3, *supra*.

Rule 7. Appointment of guardians ad litem during proceedings at chambers.

7. At any time during the proceedings at any judge's chambers under any decree or order, the judge may, if he shall think fit, require a guardian *ad litem* to be appointed for any infant or person of unsound mind not found so by inquisition, who has been served with notice of such decree or order (1st June, 1854; Ord. 7).

III. *Paupers* (*m*).

Rule 8. No person admitted to sue in formâ pauperis without certificate of counsel.

8. No person shall be admitted to prosecute any suit in this court *in formâ pauperis*, without a certificate of counsel, that he conceives the case to be proper for relief in this court (4th July, 1688) (*n*).

(*m*) The 11 Hen. 7, c. 12, relating to actions in *formâ pauperis* applies only to actions at law; but Courts of Equity have so far adopted the principle of that Act, as to admit persons who can themselves (*Wilkinson* v. *Belsher*, 2 Bro. C. C. 272), swear that they are not worth 5*l.* in the world, their wearing apparel and the subject matter of the suit excepted (*Allen* v. *McPherson*, 5 Beav. 469; and see *Davies* v. *Nixon*, 11 W. R. 62), to sue and defend *in formâ pauperis* (Ayckbourn, 638; *Spencer* v. *Bryant*, 11 Ves. 49).

Suing in formâ pauperis. Affidavit.

The 5*l.* means 5*l.* available for the suit (*Dresser* v. *Morton*, 2 Ph. 286). Where a person's property was not worth 5*l.* independently of the *property the subject of the suit*, but he was in present possession of that property, he was dispaupered (*Taprell* v. *Taylor*, 9 Beav. 493; *Butler* v. *Gardner*, 12 Beav. 525; and see *Burry Port Company* v. *Bowser*, 26 L. J. Ch. 319); so was an officer, though his half-pay was liable to be taken through his having passed through the Insolvent Court (*Boddington* v. *Woodley*, 5 Beav. 555); and a

Officer on half-pay.

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person who offered to redeem a mortgage (*Fowler* v. *Davies*, 16 Sim. 182); and it is not enough that he should swear that he has only 5*l.* except, &c., "*after payment of his just debts*" (*Perry* v. *Walker*, 1 Coll. 229). A bankrupt it seems cannot appeal from an order made in bankruptcy, *in formâ pauperis*, *Re Johnson*, 3 N. R. 655.

Executor, &c.

An executor though without assets, cannot sue or defend *in formâ pauperis* (*Oldfield* v. *Cobbett*, 1 Ph. 613; s. c. before the Court below, 1 Coll. 169; 2 Beav. 444; 3 Beav. 432), *secus*, where he is also interested as legatee, *Bayly* v. *Bayly*, 11 Beav. 256; *Everson* v. *Matthews*, 3 W. R. 159; *Flattery* v. *Anderson*, 11 Ir. Eq. Rep. 586; and *Parkinson* v. *Chambers*, 3 W. R. 343, (where an administratrix having a beneficial interest was on special application admitted to sue in that form) (see also *Rogers* v. *Hooper*, 1 W. R. 474); and in general the same rule applies to all persons filling representative characters, *St. Victor* v. *Devereux*, 6 Beav. 584, *Paradice* v. *Sheppard*, 1 Dick. 136.

Creditor of joint-stock company.

A creditor of a joint-stock company in course of being wound up may, on the usual affidavit, be allowed to sue *in formâ pauperis* (*Re Irish Land Improvement Society, Ex parte Fry*, 1 Drew. & Sm. 318.

Infants and married woman.

Infants may under special circumstances, it seems, sue by their next friends *in formâ pauperis*, *Lindsay* v. *Tyrrell*, 2 De G. & J. 7; and married women may, be permitted to sue *in formâ pauperis* (*Dowden* v. *Hook*, 8 Beav. 399), without a next friend (*Page* v. *Page*, 1 W. R. 117; *Ex parte Hakewill*, 5 D. M. G. 116; *Re Foster*, 18 Beav. 525; *Re Lancaster*, 18 Jur. 229; *Wellesley* v. *Wellesley*, 16 Sim. 1; *Wellesley* v. *Mornington*, 18 Jur. 552; *Crouch* v. *Waller*, 4 De G. & J. 43; followed in *Re Barnes*, 10 W. R. 464; *Hinde* v. *Whitmore*, 2 K. & J. 158 (where leave was given to a married woman to prosecute an appeal without a next friend, upon her affidavit that the next friend by whom she had prosecuted her suit in the court below refused to allow his name to be used any longer, and that she did not know any other person who would undertake the office). See further, as to next friends of pauper married woman and infants, *ante*, p. 162.

Peeress.

A peeress may be admitted to sue *in formâ pauperis* (*Wellesley* v. *Wellesley*, 16 Sim. 1).

Application ex parte but not of course.

The application may be made *ex parte*, generally by petition, at the Rolls, in some cases, but is not of course by motion (Daniell, 39). It is not of course in all cases, *e. g.*, in the case of a married woman who must show that she cannot find any substantial person to act as her next friend; see *Coulsting* v. *Coulsting*, 8 Beav. 463. But a husband and wife may obtain an order of course to sue in respect of the wife's reversionary interest (*Pitt* v. *Pitt*, 1 W. R. 301). For form of order, see Seton, 1271. So an infant must show special grounds, *Lindsay* v. *Tyrrell*, 24 Beav. 124; 2 De G. & J. 7; and see generally as to special applications, *St. Victor* v. *Devereux*, 6 Beav. 584. As to a defendant attached for want of answer pleading poverty, and being allowed to defend *in formâ pauperis*, see Ord. XII. 4; and as to a prisoner in contempt being visited as provided by 23 & 24 Vict. c. 149, s. 2, and having solicitor and counsel assigned him, see p. 307, *ante*.

Appeals and other proceedings in formâ pauperis.

A person may appeal (*Bland* v. *Lamb*, 2 Jack. & W. 402; *Crouch* v. *Waller*, l. c., or file a bill of review (*Fitton* v. *Macclesfield*, 1 Vern. 263), *in formâ pauperis*, and as to deposits and certificates of counsel on appeals by persons suing *in formâ pauperis*, see *Bradberry* v. *Brooke*, 4 W. R. 699; *Grimwood* v. *Shave*, 5 W. R. 482; *Phillips* v. *Phillips*, 8 Jur. N. S. 145. When an order to sue *in formâ pauperis* had been made in the Court below, it was held unnecessary to obtain a fresh order to appeal *in formâ pauperis*, *Drennan* v. *Andrew*, 1 L. R. Ch. 300.

So a person may be examined *pro interesse suo* (as to which see Daniell, 954) *in formâ pauperis* (*James* v. *Dore*, 2 Dick. 728), present a petition of right: Ord. 1 Feb. 1862, r. 5, *post*, or a petition under the Trustee Relief Act (*Re Money*, 13 Beav. 109), or under the Custody of Infants' Act, 2 & 3 Vict. c. 54; *Ex parte Hakewell*, 3 D. M. G. 116; or sue as a creditor of a joint-stock company being wound up (*Re Irish Land Improvement Society, Ex parte Fry*, 1 Drew. & Sm. 318); or present a petition.

When *pauper* pays costs.

A party suing *in formâ pauperis*, though unsuccessful, cannot be ordered to pay costs, unless he has been unsuccessful by his own default in proceed

ing; thus a plaintiff suing *in formâ pauperis*, who amends by leaving out parties, must pay their costs, *Wilkinson* v. *Belsher*, 2 Bro. C. C. 272; and if he dismisses his own bill *ex parte*, he must generally pay costs, *Parkinson* v. *Hanbury*, 4 D. M. G. 508; but see this doubted, Daniell, 43.

As to a pauper instituting a second suit, after dismissing the first, see Morgan & Davey, 270. A person who during the pendency of a suit obtains an order to sue or defend *in formâ pauperis*, *may* be ordered to pay costs up to the date of the order, *Prince Albert* v. *Strange*, 13 Jur. 507; *Smith* v. *Pawson*, 2 De G. & Sm. 490. Costs ordered to be paid to a person suing *in formâ pauperis*, are to be taxed as *dives* costs, unless the Court directs otherwise, Ord. XL. 5.

Costs where order not served.

(*n*) A party who has obtained the order to sue *in formâ pauperis*, must serve notice thereof on the other side, and if he omits such service, *malâ fide*, *i. e.*, with the intention of getting *dives* costs if he succeeds, but paying pauper costs if he fails, he will have to pay *dives* costs in respect of a step taken in the suit before such service, *Ballard* v. *Catling*, 2 Keen, 606; *Smith* v. *Pawson*, 2 De G. & Sm. 490.

A party may be dispaupered on becoming of ability to sue or defend himself,

If the order was obtained irregularly, and on suppression of a material circumstance, *Nowell* v. *Whittaker*, 6 Beav. 407; or if at any time pending the suit the party suing or defending *in formâ pauperis* becomes of ability to sue, or to defend himself, the Court will dispauper him (*Perry* v. *Walker*, 1 Coll. 229; and see cases in the reported note); but under certain circumstances he may be readmitted to sue or defend *in formâ pauperis*. The mere possession of property, however, is not sufficient, if it is wrongful (*Perry* v. *Walker*, 1 Y. & Coll. C. C. 676); nor will the circumstance of the pauper having sued another person at law not *in formâ pauperis* (*ibid.*), or the pauper being in regular employment (*ibid.*), be sufficient. If it is made to appear to the Court that the party was not in fact "a pauper" when he made his affidavit, the order will be discharged with costs (*Romilly* v. *Grint*, 2 Beav. 186; and see *Goldsmith* v. *Goldsmith*, 5 Hare, 123; *Mather* v. *Skelmerdine*, 7 Beav. 267; and a person may be dispaupered, though indebted and embarrassed, *Perry* v. *Walker*, 1 Coll. 229; *Romilly* v. *Grint*, l. c.).

The circumstance of a subscription having been made to help the plaintiff in the suit, however objectionable on the ground of maintenance, is no ground for dispaupering (*Corbett* v. *Corbett*, 16 Ves. 409).

It is too late three years after the order, and after the defendants have answered, and the plaintiff has filed replication, to move to discharge for irregularity an order for the plaintiff to sue *in formâ pauperis* (*Parkinson* v. *Hanbury*, 4 D. M. G. 508; *St. Victor* v. *Devereux*, 6 Beav. 586).

or if he behaves vexatiously.

So, if a pauper behaves vexatiously in the conduct of the suit, he may be dispaupered, *Wagner* v. *Mears*, 3 Sim. 127; *Daintree* v. *Haynes*, 12 Jur. 594; *Perry* v. *Walker*, 1 Coll. 229; but vexatious conduct in a former suit, is no ground for dispaupering, *Corbett* v. *Corbett*, 16 Ves. 409. See rule 11, *infra*, and note.

Rule 9. Counsel or solicitor how remunerated.

9. After an admittance to sue or defend *in formâ pauperis*, no fee, profit, or reward, shall be taken of the pauper by any counsel or solicitor, for the despatch of the pauper's business during the time it shall depend in court, and he shall continue *in formâ pauperis;* nor shall any agreement be made for any recompense or reward afterwards. And any person offending herein shall be deemed guilty of a contempt of court; and the party admitted, who shall give any such fee or reward or make any such agreement, shall be from thenceforth dispaupered (*o*), and not be afterwards admitted again in that

ORDER VII. Parties, Persons under Disability, and Paupers.

suit to sue or defend *in formâ pauperis* (22nd May, 1661; Sanders, 312).

(*o*) As to dispaupering, see note (*n*), *supra*.

Dispaupering paupers.

Rule 10. Counsel and solicitor assigned may not refuse without reason.

10. The counsel or solicitor assigned by the Court (*p*) to assist a person admitted *in formâ pauperis*, either to sue or defend, may not refuse so to do (*q*), unless such counsel or solicitor satisfy the judge who granted the admittance with some good reason for his unwillingness to be so assigned (*r*) (22nd May, 1661; Sanders, 312).

(*p*) As to assigning counsel where a defendant cannot answer by reason of poverty, see Ord. XII. 4, p. 436, *post*, and where he is in prison, see, p. 307, *ante*.

On application of plaintiff.

The Court cannot assign counsel or a solicitor to the defendant on the application of the *plaintiff* (*Garrod* v. *Holden*, 4 Beav. 245; and see *Watkins* v. *Parker*, 3 M. & C. 370).

(*q*) After counsel and solicitor have been assigned, the *pauper* cannot be heard in person, *Parkinson* v. *Hanbury*, 4 D. M. G. 508.

(*r*) See, under the old practice, *Lewis* v. *Kennett*, 3 Russ. 466.

Rule *11. No process of contempt at the suit of a pauper; notices of motion or petitions on his behalf to be signed by his solicitor.

*11. No process of contempt shall be issued at the instance of any person suing or defending *in formâ pauperis*, until it be signed by his solicitor in the suit. And no notice of motion served or petition presented on behalf of any person admitted to sue or defend *in formâ pauperis* (except for the discharge of his solicitor) shall be of any effect, nor shall any person served with such notice or petition be bound to appear thereon, unless such notice or petition be signed by the solicitor of such person so suing or defending. And such solicitor shall take care (*s*) that no such process be taken out, and that no such notice or petition be served, needlessly or for vexation (*t*) but upon just and good grounds (22nd May, 1661; Sanders, 313).

Solicitor may be ordered to pay costs personally.

(*s*) A pauper's solicitor may be ordered personally to pay the costs of any irregular proceedings (see *Brown* v. *Dawson*, 2 Hog. 76).

As to signing notices, &c., on behalf of paupers, see Ord. III. 1, p. 385, *ante*.

(*t*) A pauper may be dispaupered for vexatious conduct (*Perry* v. *Walker*, 4 Beav. 452, note (*n*), *supra*).

ORDER VIII.

Order VIII. Pleadings and Written Proceedings generally.

Pleadings and Written Proceedings Generally.

Rule 1. Signature of counsel.

1. The Clerks of Records and Writs shall not file any bill, exceptions, demurrer, plea, answer, or disclaimer (*a*), unless the same be signed by counsel (*b*) (Henry V. Ord. 17; and 22nd May, 1661; Sanders, 298, 300).

Disclaimer.

(*a*) As to disclaimers, see Daniell, 653, *et seq.*, and as to the costs of disclaimers, see Morgan & Davey on Costs, 81, *Dillon* v. *Ashwin*, 12 W. R. 366; and as to plaintiff dismissing his bill against disclaiming defendants, see *Durrant* v. *Durrant*, 10 Jur. N. S. 92.

Counsel's signature and sanction to bills, &c.

(*b*) A bill not signed by counsel is demurrable (*Kirkley* v. *Burton*, 3 Madd. 378), or may be taken off the file (*French* v. *Dear*, 5 Ves. 547; *Burch* v. *Rich*, 1 R. & M. 156; and where a plaintiff improperly altered the bill, after it had been signed by counsel, it was taken off the file with costs to be paid by the plaintiff, *Troup* v. *Ricardo*, 13 W. R. 147.

See further as to the sanction required in the case of bills and informations, note (*a*), next page.

An amended bill not required to be printed, if amended by the counsel who signed the bill, need not be re-signed (*Webster* v. *Woodfall*, 1 S. & S. 135).

If the signature be omitted, defendant may apply for leave to amend (*Harrison* v. *Delmont*, 1 Price, 108); see *Coppeard* v. *Mayhew*, 22 L. J. Ch. 408.

A special case must be signed by counsel, see *ante*, p. 121.

Rule 2. Perusal by counsel.

2. No counsel shall sign any bill, answer, or other pleading, unless it be drawn, or, at least, perused, by himself before it be signed. And counsel shall take care that deeds, writings, or records, be not unnecessarily set out therein *in hæc verba;* but that so much of them only as is pertinent and material be set out or stated, or the effect and substance of so much of them only as is pertinent and material be given, as counsel may deem advisable, without needless prolixity; and that no scandalous matter (*c*) be inserted therein (22nd May, 1661; Sanders, 296).

(*c*) As to scandal, see notes to Ord. XVI. 21, *post*.

Rule 3. Filing of pleadings.

3. No bill, answer, or other pleading, shall be said to be of record, or be of any effect in court, until the same be filed in the office of the Clerks of Records and Writs (22nd May, 1661; Sanders, 297. 8th May, 1673, Ord. 4).

Rule *4. Claims abolished.

*4. No claim shall be filed after the fourteenth day of February, 1860.

Order IX. Bills.

ORDER IX.

Bills.

I. *Bills generally* (*a*).

Rule 1. Value of subject matter.

1. Every suit, the subject matter of which is under the value of 10*l.*, shall be dismissed, unless it be instituted to establish a general right, or unless there shall be some other special circumstance (*b*), which, in the opinion of the Court, shall make it reasonable that such suit should be retained (29th Jan. 1618-19; Ord. 15).

(*a*) As to the form of a bill, see Sched. A. Appendix, p. i., *post*.

Informations. Sanction to.

The word "bill" includes an information (Prel. Ord. X. (4), p. 364, *ante*). The Attorney-General must sign and sanction an information before it is filed or amended (*Attorney-General* v. *Fellowes*, 1 J. & W. 254). A certificate of the relator's solicitor of his competency to pay the costs, and that the printed copy of the bill is a true copy of the draft prepared by counsel, is required by the Attorney-General before giving his sanction.

Bill filed *without* sanction.

A bill improperly filed without the client's sanction, will be ordered to be taken off the file with costs to be paid by the solicitor, *Jardine* v. *Bright*, 10 W. R. 380, see *Re Thompson*, 25 Beav. 245; Daniell, 290; Seton, 853. As to bills filed in the name of a company, but without their sanction, see *East Pant Du Mining Company* v. *Merryweather*, 13 W. R. 216. As to consent of relator's next friends, &c., see 15 & 16 Vict. c. 86, s. 11, p. 165, *ante*, and as to signature by counsel, see last order.

Bill to establish rights.

See *Cox* v. *Foley*, 1 Vern. 359, where a bill for establishing a right to ancient quit rents of very small value was allowed to be filed. Where the suit is for the benefit of a charity it will be entertained though for a smaller amount than 10*l.* (*Parrot* v. *Pawlet*, Cary's Rep. 103).

Where information withheld.

(*b*) Where the sum recovered was only 9*l.*, it was held that the suit was sustainable, and the plaintiff was entitled to his costs, because the defendants had withheld information, and the plaintiff was justified in supposing that he might have recovered more (*Beckitt* v. *Bilbrough*, 8 Hare, 188). The objection may be taken advantage of by demurrer, or at the hearing (*Brace* v. *Taylor*, 2 Atk. 253).

Rule 2. Form of bill.

2. Bills may be in a form similar to the form set out in Schedule (A.) to these Orders (*c*), with such variations as the nature and circumstances of each particular case may require (7th Aug, 1852; 1st Set, Ord. 14).

* Endorsement on bills.

* And bills shall be endorsed in the manner set forth in the Schedule to the Stat. 15 & 16 Vict. c. 86, except that, instead of the words in the note, "You will be liable to be arrested and imprisoned," there shall be substituted the words, "The plaintiff may enter an appearance for you, and you will be liable to be arrested

and imprisoned, and to have a decree made against you in your absence" (*d*).

(*c*) See Schedule A., Appendix, p. 1.
(*d*) See as to the indorsements on bills, p. 226, *ante*, and note (*e*) p. 162, *ante*.

Rule *3. Printing of bills.

*3. Bills shall be printed (*e*) on cream-wove machine-drawing foolscap folio paper, 19lbs. per mill ream, in pica type, leaded, with an inner margin about three-quarters of an inch wide, and an outer margin about two inches and a half wide (7th Aug. 1852; 1st Set, Ord. 1). And dates and sums occurring therein shall be expressed by figures instead of words (*f*).

(*e*) As to printing bills, see 15 & 16 Vict. c. 86, s. 3 (p. 162); slight alterations may be made in writing (*ibid.* note (*d*)).
(*f*) See, before the rule, *Anon.*, 9 Hare, App. lxxxiii.; and see the cases cited on Order 6th March, 1860, *post*, as to printing of answers.

Rule 4. Consequences of not filing a printed copy of a bill within 14 days.

4. The Clerks of Records and Writs shall, at the expiration of fourteen days from the filing of any written bill or written copy of a bill, under the Stat. 15 & 16 Vict. c. 86, s. 1, take off the files of the court, without further order, the bill or copy so filed, unless a printed copy thereof shall in the meantime have been filed. And the plaintiff in the suit, or his solicitor, who shall personally have undertaken to file such printed copy, shall pay to the defendant all the costs incurred by him in the suit; such costs to be taxed by the Taxing Master, without further order, upon production to him of the certificate of the Clerk of Records and Writs, that a printed copy of the bill has not been filed pursuant to such undertaking, and to be recoverable in like manner as costs ordered to be paid by a party in a suit to another party in a suit are recoverable (7th Aug. 1852; 1st Set, Ord. 3) (*g*).

(*g*) For cases where this rule has been relaxed, see notes (*l*) and (*m*), p. 164.

Rule 5. Defendant only entitled to ten copies.

5. No defendant shall be at liberty to demand from the plaintiff more than ten printed copies of his bill (7th Aug. 1852; 1st Set, Ord. 6).

Rule 6. Suits in perpetuam rei memoriam.

6. Witnesses shall not be examined *in perpetuam rei memoriam*, unless a bill shall have been filed for the purpose (29th Jan. 1618-19; Ord. 73. 12th Nov. 1556) (*h*).

(*h*) See 5 & 6 Vict. c. 69, *ante*, p. 10. It seems the Court has jurisdiction to perpetuate testimony with a view to proceedings in foreign courts (*Morris* v.

Perpetuating testimony for foreign courts.

ORDER IX. Bills.

Morris, 2 Ph. 205). See further, as to taking evidence to be used in foreign courts, 19 & 20 Vict. c. 113.

Answer admitting right to examine sufficient.

A bill for the perpetuation of testimony is distinct from a bill for discovery, and an answer admitting the plaintiff's title to examine the witnesses is a sufficient answer, *Ellice* v. *Roupell*, 32 Beav. 299; but if the defendant puts in no answer to such a bill, and stands out all process of contempt, the Court will order the examination of the witnesses, such being equivalent to taking the bill *pro confesso* (*Lancaster* v. *Lancaster*, 6 Sim. 439; *Coveny* v. *Athill*, 1 Dick. 355). Where the defendant put in a voluntary answer disputing the case made by the bill and moved to dismiss, the motion was ordered to stand over, with liberty to either party to examine witnesses to prove the point in issue, and no order was made as to costs (*Brigtocke* v. *Roch*, *Wedgwood* v. *Roch*, 7 Jur. N. S. 63).

Where defendant refuses to answer.

When voluntary answer put in, disputing plaintiff's right.

A motion to dismiss a bill to perpetuate testimony for want of prosecution, either before or after replication, is irregular (*Wright* v. *Tatham*, 2 Sim. 459; *Beavan* v. *Carpenter*, 11 Sim. 22). The proper order is that the plaintiff do proceed within a certain time, or pay the defendant his costs (*ibid.*; and see *Barham* v. *Longman*, 2 Sim. 460).

Want of prosecution.

Evidence how taken.

A special examiner may be appointed to take evidence out of the jurisdiction, see, note (*w*), p. 183; and in suits to perpetuate testimony, evidence is to be taken according to the practice as settled before the Ord. 5th Feb. 1861. See rule 16 of that order, *post*.

Rule 7. Not to be set down for hearing.

7. No suit to perpetuate the testimony of witnesses shall be set down for hearing (9th Nov. 1670) (*i*).

After examination, case ended.

Costs.

(*i*) When the witnesses have been examined there is an end of the cause (*Morrison* v. *Arnold*, 19 Ves. 670); and the defendant, upon an allegation that he did not examine any witnesses, may obtain an order of course for his costs (*Foulds* v. *Midgeley*, 1 V. & B. 138); but if he examines witnesses himself he is not entitled to any costs, *Shrine* v. *Powell*, 15 Sim. 81, Morgan & Davey, 149. Where the defendant obtains the usual order for his costs, and such order recites that the testimony of witnesses has been taken, the examination must be regarded as completely taken, and cannot be excluded because there was no sufficient cross-examination (*Watkins* v. *Atchison*, 10 Hare, App. xlvi.).

Course where cause set down.

Where, contrary to the rule, the cause is set down, the bill will be dismissed with costs, *Ellice* v. *Roupell* (No. 2), 32 Beav. 308; but the plaintiff may nevertheless have the benefit of the depositions (*Hall* v. *Hoddesdon*, 2 P. W. 162; and see *Vaughan* v. *Fitzgerald*, 1 Sch. & Lef. 316).

Unless the witnesses are incapacitated from travelling, their depositions taken in a suit instituted *in perpetuam rei memoriam*, cannot be read, *Morrison* v. *Arnold*, 19 Ves. 670, and see *Watkins* v. *Atchison*, 10 Hare, App. lxvi.

II. *Amendment of Bills* (*j*).

Rule 8. Order for leave to amend before answer.

8. An order for leave to amend a bill may be obtained at any time before answer (*k*), upon motion or petition, without notice (8th May, 1845; Ord. 64) (*l*).

What amendments are of course.

(*j*) As to what parties and what facts may be introduced by amendment, see note (*p*), pp. 216, 217, *ante*.

As to slight alterations in the print of a bill, see note (*d*), p. 162, *ante*.

Information.

An information cannot be amended without the sanction and signature of the Attorney-General, *Attorney-General* v. *Fellowes*, 1 G. & W. 254.

As to printing amendments, see, *infra*, rule 18, and note.

As to time allowed for amending, see rule 24, *infra*, p. 417.

As to indorsement on amended bill, see note (*e*), p. 162, *ante*.

As to plaintiff's costs of amendment and defendant's costs thereby occasioned, see Ord. XL. 7, 8, *post*, Daniell, 385.

Indorsement.

As to amendment of a defendant's concise statement, see *Mertens* v. *Haigh*, 2 W. N. (1867), 198.

Amendments struck out.

Where a plaintiff had amended his bill, and found it necessary afterwards to apply for leave to strike out the amendments, such leave was granted, *Eagles* v. *Le Breton*, 5 L. T. N. S. 818, and see form of order, Seton, 1254.

Interim injunction not ipso facto dissolved by amendment of bill,

If the plaintiff obtains an order to *amend, after obtaining an interim injunction*, such order will be *primâ facie* without prejudice to the injunction, *Kennedy* v. *Lewis*, 14 Jur. 166, and see remarks thereon in Seton, 873; though until the practice as to special and common injunctions was assimilated (see p. 221, *ante*), the order to amend was not always without prejudice in the case of the common injunction. So the order to amend need not contain the words "without prejudice" in order to save the injunction, nor will these words, if inserted, preclude the defendant from moving to dissolve the injunction in a proper case, *e. g.*, if the plaintiff by amendment has changed the record, *Attorney-General* v. *Marsh*, 16 Sim. 572; or broken the terms of an arrangement, *Clarke* v. *Clark*, 13 W. R. 133; and see *Harding* v. *Tingey*, 12 W. R. 703.

but defendant may move to dissolve,

but not writ of ne exeat.

A writ of *ne exeat* is not lost by amendment of the bill, *Grant* v. *Grant*, 5 Russ. 189.

Notice of motion is gone if plaintiff afterwards amends bill.

Where a plaintiff *amends after giving notice of motion*, the notice is gone (*Martin* v. *Frost*, 8 Sim. 199; *Moneypenny* v. ——, 1 W. R. 99), whether the motion be for an injunction or a receiver, *Smith* v. *Dixon*, 12 W. R. 934; and he must pay the costs occasioned by the notice thus waived, Ord. XL. 23, *post*. So by amendment the plaintiff is considered to have purged a defendant's contempt for want of answer, note (*p*), next page, and a previous order to take the bill *pro confesso*, becomes inoperative, but the order for amendment may save the plaintiff's rights, 1 Will. 4, c. 36, s. 15, r. 10; and see *Weightman* v. *Powell*, 2 De G. & Sm. 570.

By amendment plaintiff waives defendant's contempt.

Similarly, a plaintiff can only call for an answer to his amended bill in respect of the amendments; for by amending he admits the former answer sufficient; see note (*n*) to Ord. XVI. 12, *post*; and as to costs where an answer to an amended bill is vexatiously required, see *Cocks* v. *Stanley*, 6 W. R. 45.

Time for amendment.

(*k*) If no answer is required and none is put in, there seems to be no limit to amendment but the Court's discretion, *Gill* v. *Rayner*, 1 K. & J. 395.

Where no answer required.

After answer.

The following rules of this order provide that *after the answer*, or last of the answers is put in, a plaintiff is entitled at any time *within four weeks* (if no defendant has moved to dismiss for want of prosecution, see rule 12), to one order of course to amend (unless he has undertaken to file replication), which may be applied for by motion in Court or petition at the Rolls (Ayckb. 33), see rr. 10, 11.

(*l*) Applications for leave to amend, which are not of course, must be obtained by special application in chambers (*ante*, p. 146). For the evidence necessary in support of such special application, see rr. 14, 15, 16.

When special application is necessary.

The order of course to amend is irregular, if there is any concealment of material circumstances affecting the original bill, *e. g.*, if a demurrer has been served and set down, *Hoflich* v. *Reynolds*, 9 W. R. 398, or a plea, see *Neck* v. *Gains*, cited in note to sect. 10, *infra*, or if an appeal from a demurrer is pending (*Ainslie* v. *Sims*, 17 Beav. 174; and see *Lewis* v. *Cooper*, 2 Ph. 178, and cases there cited), or if a reference, whether the bill is for an infant's benefit, is pending, *Fletcher* v. *Moore*, 11 Beav. 617.

Order operates from service.

The order for leave to amend operates from the day of service only (*Price* v. *Webb*, 2 Hare, 515, cited, *post*, note to rule 12; and see *James* v. *Charlemont*, 12 Jur. 389). Where the plaintiff does not require a further answer, the order to amend should state this (*Boddington* v. *Woodley*, 9 Sim. 380; and see *Hemingway* v. *Fernandez*, 12 Sim. 165); but notwithstanding service of order, defendant may answer original bill (*Mackerell* v. *Fisher*, 14 Sim. 604).

On an application to amend when interrogatories have been filed, but no answer has been put in (*ex. gr.*, when a demurrer is allowed), it may become

ORDER IX. Bills.

proper to ask for leave to amend both the bill and the interrogatories, as the latter cannot be amended under an order to amend the bill alone.

Rule 9. Clerical errors rectified.

9. An order for leave to amend a bill only for the purpose of rectifying some clerical error in names, dates, or sums, may be obtained at any time, upon motion or petition, without notice (8th May, 1845; Ord. 65) (*m*).

(*m*) See *Barnes* v. *Ridgway*, 1 Sm. & Gif. App. xviii.

Effect of order on order to take bill pro confesso.

An order obtained under this rule was held to render an order to take a bill *pro confesso* inoperative, see *Weightman* v. *Powell*, cited last page; but see *Cheeseborough* v. *Wright*, 28 Beav. 173.

As to misnomers in copies of bills served on formal parties, see *Witham* v. *Salvin*, 16 Jur. 420, cited in notes to Ord. X. 12, p. 428, *post*.

Rule 10. Time for order of course for leave to amend, where one answer.

10. (*n*) Where there is a sole defendant, or where, there being several defendants, they all join in the same answer, the plaintiff may, after answer and before replication or undertaking to reply, obtain one order of course (*o*) for leave to amend the bill, at any time within four weeks after the answer is to be deemed or is held to be sufficient (*p*) (8th May, 1845; Ord. 16, Art. 32).

(*n*) An order of course cannot be obtained under this or the following rules, when the answer to the discovery sought has been accompanied by a plea to the relief sought (*Neck* v. *Gains*, 1 De G. & Sm. 223), and see note (*l*), *supra*.

(*o*) Any further order must be obtained by special application by summons in chambers, see rr. 13, 15, *infra*, and p. 146, *ante*.

Amendment after answer to amended bill.

(*p*) The rule applies to the case of an answer to an amended as well as to an original bill, *Masterman* v. *Midland, &c. Company of Ireland*, 20 L. J. Ch. 43; *Mackintosh* v. *Great Western Railway Company*, *ibid.* 550; *Wharton* v. *Swann*, 2 M. & K. 362.

Insufficient answer is no answer.

An insufficient answer, held or admitted to be such, is to be treated as no answer; and, therefore, an order to amend may be obtained, and renewed as of course in spite of such insufficient answer having been put in, *Bird* v. *Hustler*, 1 R. & M. 327; *Mendizabel* v. *Hullett*, *ibid.* 324; *Turner* v. *Turner*, 4 Sim. 49; *Dipper* v. *Durant*, 3 Mer. 465; but the renewed application should be made within the time originally allowed for amendment, *Dolly* v. *Challin*, 11 Beav. 61.

Answer admitted sufficient.

An answer, however insufficient in fact, is deemed sufficient until it is held or admitted to be otherwise, and an amendment of the bill after an answer has been put in, and before it is held insufficient, operates as an admission of sufficiency, and as a waiver of exceptions (*De La Torre* v. *Bernales*, 4 Madd. 396; *Jacob* v. *Hall*, 12 Ves. 458).

A voluntary answer is at once sufficient, *Rogers* v. *Fryer*, 2 W. R. 67.

If a plaintiff excepts and gives notice of abandoning his exceptions, he shortens his time for obtaining the order of course to amend, *Peile* v. *Stoddart*, 11 Beav. 591.

Expiration of four weeks.

As to computation of time, see, *post*, Ord. XXXVII. 9. The four weeks do not expire till twelve o'clock on the night of the last day included therein (*Preston* v. *Collett*, 20 L. J. Ch. 228).

Rule 11. Time for order of course for

11. Where there are several defendants (*q*) who do not join in the same answer, the plaintiff (if not precluded

from amending, or limited as to the time of amending by some former order) may, after answer and before replication or undertaking to reply, at any time within four weeks after the last of the answers required to be put in (*r*) is to be deemed or is held to be sufficient, obtain one order of course, for leave to amend his bill (8th May, 1845; Ord. 16, Art. 33).

leave to amend, where several answers.

(*q*) When the defendant who does not answer is stated to be out of the jurisdiction, it is irregular to obtain an order to amend after the four weeks from the time of the answers of the other defendants having been found sufficient, *King of Spain* v. *Hullett*, 1 R. & M. 7, note.

When defendant who does not answer is out of jurisdiction.

(*r*) The "last answer required" means "the last answer required to be put in previous to replication" (*Arnold* v. *Arnold*, 1 Ph. 806), *i. e.*, the last of several answers filed by several defendants (*Forman* v. *Gray*, 9 Beav. 200; *Duncombe* v. *Lewis*, 10 Beav. 273; *Stinton* v. *Taylor*. 4 Hare, 608; whereas in the Order XXXIII. 10 (1), relating to motions to dismiss, the same words mean "the last answer of one of several defendants," see *Sprye* v. *Reinsell*, 10 Beav. 351. But if defendants are added by amendment after answer, the time is not reckoned from the time when the last of the *new* defendant's answers is sufficient, but from the time when the last of the *original* defendant's answers was sufficient, *Bertolacci* v. *Johnstone*, 2 Hare, 632; *Attorney-General* v. *Nethercoat*, 2 M. & Cr. 604.

"Last answer."

Rule 12.

12. Provided always that the plaintiff shall not obtain an order of course for leave to amend his bill after any defendant (being entitled to move) has served a notice of motion to dismiss the bill for want of prosecution (13th April, 1847) (*s*).

No order of course for leave to amend, after motion to dismiss.

(*s*) Where a notice of motion to dismiss was served, but withdrawn, it did not prevent the common order to amend, *Briggs* v. *Beale*, 4 N. R. 261.

Order obtained but not served.

An order to amend dates from its service (*Price* v. *Webb*, 2 Hare, 515), therefore an order of course to amend obtained but not *served* before service of a notice of motion to dismiss for want of prosecution, is a nullity, and is therefore no answer to the motion to dismiss, *Jones* v. *Lord Charlemont*, 12 Jur. 389. Comp. *Morris* v. *Owen*, 1 V. & B. 523; but the rule of the Court now is to treat all orders made as valid until they are regularly discharged; see *Story* v. *Official Manager of the National Insurance Company*, 8 L. T. N. S. 534; and note to Ord. VI. 4, p. 395, *ante*.

When the defendant has moved to dismiss, an order to amend may be applied for under the 14th sect., and does not require the additional affidavit mentioned in the 15th section, *Collett* v. *Preston*, 3 M. & G. 432.

Rule 13.

13. No more than one order of course for leave to amend a bill shall be granted after an answer has been filed, unless in the case provided for by the 9th Rule of this Order (8th May, 1845; Ord. 66) (*t*).

Only one order of course for leave to amend, after answer.

(*t*) The 9th rule relates to clerical errors.

Application of rule.

Even as against a defendant added by amendment after answer, no further amendment can be added as of course, *Attorney-General* v. *Nethercoat*, 2 M. & Cr. 604, overruling *Evans* v. *Hughes*, 5 Sim. 666; and the rule applies to bills for discovery as well as bills for relief, *Peile* v. *Stoddart*, 11 Beav. 591.

Second amendment.

ORDER IX. Bills.

But the Court, exercising the discretion given by Ord. XXXVIII. 17, *post*, waived this rule where a plaintiff was in Jamaica, and could not amend within the time allowed by the first order of course, *Crossley* v. *Dorning*, 15 W. R. 1078.

Order obtained.

An order obtained in violation of this rule will be discharged with costs, *Edge* v. *Duke*, 10 Beav. 184; *Horsley* v. *Fawcett*, 10 Beav. 191; *Bennett* v. *Honeywood*, 1 W. R. 490; but the amended bill, unless it is a new engrossment, need not be taken off the file, *Attorney-General* v. *Cooper*, 3 M. &. Cr. 258.

Rule 14. Special orders to amend, not to be granted without affidavit.

14. A special order for leave to amend a bill shall not be granted without affidavit (*u*) to the effect,—1st, that the draft of the proposed amendments has been settled, approved, and signed by counsel; and, 2ndly, that such amendment is not intended for the purpose of delay or vexation, but because the same is considered to be material for the case of the plaintiff (8th May, 1845; Ord. 67) (*w*).

Affidavit by whom to be made.

(*u*) The affidavit is made by the plaintiff and his solicitors, or by the solicitor alone, in case the plaintiff, from being abroad, or otherwise, is unable to join (r. 16). The application is made in chambers, *ante*, p 146.

(*w*) As to special applications, see note (*l*), p. 411, *ante*.

Rule 15. Where further affidavit required.

15. After the plaintiff has filed or undertaken to file a replication (*x*), or after the expiration of four weeks from the time when the answer (*y*), or the last of the answers required to be put in, is to be deemed or is held to be sufficient, a special order for leave to amend a bill shall not be granted without further affidavit, showing that the matter of the proposed amendment is material (*z*), and could not, with reasonable diligence, have been sooner introduced into such bill (8th May, 1845; Ord. 68) (*a*).

Order of course to amend by adding parties, irregular after replication.

(*x*) An order of course, obtained after replication, to amend even by adding parties, is irregular (*Hitchcock* v. *Jaques*, 9 Beav. 192; see, under the old practice, *Brattle* v. *Waterman*, 4 Sim. 125). Such an order, however, may be obtained *ex parte* (*Bryan* v. *Wastell*, Kay, App. xlvii.).

(*y*) See note (*p*), p. 412, *ante*.

(*z*) Leave to withdraw replication and amend the bill by claiming less than had been claimed by the original bill was granted on plaintiff's undertaking not to require an answer to the amended bill, *Forbes* v. *Stevens*, 4 N. R. 386, overruling s. c. 4 N. R. 185.

Affidavit that the amendment is material.

When leave will not be given.

(*a*) The affidavit need not set out all the proposed amendments (*Payne* v. *Little*, 19 L. J. Ch. 458), but it must show circumstances from which the Court can itself judge as to the materiality and diligence, *Stuart* v. *Lloyd*, 3 M. & G. 181; and see *Attorney-General* v. *Fishmongers' Company*, 4 M. & Cr. 1; *Philips* v. *Goding*, 1 Hare, 40. For leave will not be given unless the Court is satisfied from the occasion and necessity for the proposed amendments that it ought to be given (*Bertolacci* v. *Johnstone*, 2 Hare, 632). The affidavit must show due diligence co-extensive with the whole time from the filing of the answer (*Winnall* v. *Featherstonhaugh*, 9 Jur. 1054; on appeal to L. C., 10

Jur. 235). Where the affidavit stated that "having regard to these circumstances, the amendments could not with," &c., this was held sufficient (*Attorney-General* v. *Corporation of London*, 13 Beav. 313) : see further, as to due diligence and the terms under which the order will be made after replication, *Champneys* v. *Buchan*, 3 Drew. 5. A motion to withdraw replication and amend the bill after the evidence had closed was refused with costs, *Horton* v. *Brocklehurst*, 29 Beav. 503 ; and see Ord. XVII. 2 ; and *Price* v. *Salusbury*, 32 Beav. 446.

Amending at hearing and after issue directed.

As to amending at the hearing, or after decree, see the cases cited in notes p. 217 (*ante*) ; and *Milligan* v. *Mitchell*, 1 M. & Cr. 433.

As to the course to be adopted where the time has been allowed to go by through inadvertence, see *Potts* v. *Whitmore*, 10 Beav. 177 ; and *Clarke* v. *Mayor of Derby*, cited in note (*g*), *post*.

16. Such affidavits as are mentioned in the 14th and 15th Rules of this Order shall be made by the plaintiff and his solicitor, or by the solicitor alone, in case the plaintiff, from being abroad or otherwise, is unable to join therein [8th May, 1845 ; Ord. 69) (*a*).

Rule 16. Affidavits to be made by plaintiff and solicitor.

(*a*) The affidavit on motion to amend an information may be sworn by the solicitor to the relators only (*Attorney-General* v. *Corporation of London*, 13 Beav. 313 ; *Attorney-General* v. *Wakeman*, 15 Sim. 358). An affidavit by the solicitor's managing clerk has been held insufficient (*Christ's Hospital* v. *Grainger*, 1 Ph. 634). But when the facts are within the personal knowledge of the clerk, the Court may require his affidavit as well as that of the solicitor (*ibid.* ; see, too, *Handfield* v. *Woolley*, 4 Sim. 122).

By whom affidavit must be sworn.

17. The plaintiff, having obtained an order for leave to amend his bill, shall, in all cases in which no other time is limited by such order, have fourteen days (*b*) after the date of the order within which he may amend such bill (8th May, 1845 ; Ord. 16, Art. 34) (*c*).

Rule 17. Time for amendment, 14 days.

(*b*) The omission of the plaintiff to amend within the time limited does not deprive him of his right to obtain a second order to amend before any answer is put in, *Nicholson* v. *Peile*, 2 Beav. 497.

(*c*) This rule applies to cases where special leave to amend is given (*Cridland* v. *Lord De Mauley*, 2 De G. & Sm. 560), and to cases where liberty is given to amend upon the allowance of a demurrer (*Bainbrigge* v. *Baddeley*, 12 Beav. 152 ; *Armitstead* v. *Durham*, 11 Beav. 428 ; and see *Nicholson* v. *Peile*, 2 Beav. 497); and where leave is given to amend by adding parties at the hearing, *Jampier* v. *Ingle*, 1 N. R. 159.

Fourteen days allowed in all cases,

It seems that the fourteen days are now allowed in all cases to a plaintiff even after amending after obtaining an injunction, though formerly seven days only were allowed where a common injunction had been obtained, see *Kennedy* v. *Lewis*, 14 Jur. 166, and remarks thereon in Seton, 873.

even after injunction obtained.

As to motion by defendant to dismiss in consequence of neglect to amend, see r. 24, *infra*, and Ord. XXXIII. 11, *post*.

18. Where an amendment of a bill might formerly have been made without a new engrossment thereof, a bill may be amended by written alterations in the printed bill which has been filed, and by additions on paper to be

Rule 18. Mode of amending bill.

ORDER IX. Bills.

interleaved therewith if necessary (7th Aug. 1852; 1st Set, Od. 7) (*d*). *But where such amendment could not formerly have been made without a new engrossment, it shall be made by a reprint of the bill.

When bill must be reprinted on amendment.

(*d*) When the amendments exceed two folios of ninety words each, in one place, the bill must in all cases be reprinted (*Stone* v. *Davies*, 3 D. M. G. 240), and although the amendments do not exceed in any one place two folios, the Clerk of Records and Writs has a discretion to refuse to file it without reprint, if the amendments are numerous and complicated, *John* v. *Lloyd*, 1 L. R. Ch. 64. A bill cannot be amended, partly by written and partly by printed amendments (*Naylor* v. *Wright*, 7 D. M. G. 403; see 15 & 16 Vict. c. 86, s. 8, and notes, *ante*, p. 165).

It has been suggested that much trouble might be saved, if, upon an amendment of the bill by reprint, the amendments were required to be printed in italics.

Rule 19. Date of order and of amendment to be marked on record.

19. Whenever any bill upon the file of this court shall be amended, the record of such bill, when amended, shall be marked with the date of the order under which the same is so amended, and of the day on which such amendment is made, in manner and form following:—viz., "*Amended day of , by Order dated day of* ." And the usual entry of such amendment, together with the aforesaid date of making such amendment and the date of the order, shall be made in the Record and Writ Clerk's book. And such amended bill shall be deemed to be filed at and from the date of making such amendment (12 May, 1838).

Amendment, to be entered with date of amendment and of order.

Rule 20. Amended bill how served.

20. A copy of an amended bill, whether upon an amendment by a reprint or by such alterations and additions as mentioned in the 18th Rule of this Order shall be served upon the defendant or his solicitor; and such copy may be partly printed and partly written, if the amendment is not made by a reprint: and in every case the copy to be served shall be stamped with the proper stamp by one of the Clerks of Records and Writs, indicating the filing of such amended bill, and the date of the filing thereof (7th Aug. 1852; 1st Set, Ord. 9) (*e*).

(*e*) The copies to be served are altered by the solicitor previously to the same being stamped by the Record and Writ Clerk. A fee by means of stamps, of 1*s.*, according to the lower scale, and 5*s.* according to the higher scale, is payable to the Record and Writ Clerk for marking every copy, Appendix, p. xlix. *post*.

Rule 21.

21. Service upon a defendant's solicitor of a copy of an

amended bill, whether wholly printed or partly printed and partly written, shall be good service on such defendant (7th Aug. 1852; 1st Set, Ord. 10. 8th May, 1845; Ord. 26) (*f*). Order IX. Bills. Service on solicitor to be good service.

(*f*) This and the next rule were held to authorise substituted service of an amended bill on the solicitors of a *defendant out of the jurisdiction*, *Zulueta* v. *Vinent*, 3 M. & G. 246, overruling *Marquis of Hertford* v. *Suisse*, 13 Sim. 489. Substituted service of amended bill.

22. Where a defendant has appeared in person to any bill, service at the address for service of such defendant of a copy of an amended bill, whether wholly printed or partly printed and party written, shall be good service on such defendant (7th Aug. 1852; 1st Set, Ord. 11). Rule 22. Service on defendant in person.

23. The 3rd, 4th, 5th, 18th, 20th, 21st and 22nd Rules of this Order shall not apply to bills filed before the 2nd day of November, 1852, though afterwards amended; and the practice existing immediately before that day shall continue in force, with reference to the amendment of such bills (7th Aug. 1852; 1st Set, Ord. 12). Rule 23. Application of orders to old suits.

24. Where the plaintiff obtains an order for leave to amend his bill, and does not amend the same within the time thereby limited for that purpose, or, if no time is so limited, then, within fourteen days from the date of the order, such order to amend becomes void, and the cause, as to dismissal, stands in the same situation as if such order had not been made (8th May, 1845; Ord. 70) (*g*). Rule 24. In default of amendment within time limited or 14 days, order void.

(*g*) Where the plaintiffs had, in consequence of the misconduct of their solicitor, omitted to amend their bill within the time allowed, a motion for further time was refused, *Clarke* v. *Mayor of Derby*, 10 Jur. 978; but see *Champneys* v. *Buchan*, 3 Drew. 5; *Bainbridge* v. *Baddeley*, 12 Beav. 152; *Crossley* v. *Dorning*, 15 W. R. 1078, cited in note to sect. 13, *ante*. Accidental omission.

ORDER X.

Service of Copy of Bill, and Appearance.

Order X. Service of Copy of Bill, and Appearance.

1. (*a*) Service of every copy of a bill shall be effected by serving such copy personally, or by leaving the same with a servant of the defendant or some member of his Rule 1. Service of copy of bill.

ORDER X. Service of Copy of Bill, and Appearance.

family, at his dwelling-house or usual place of abode, unless the Court directs some other mode of service (*a*) (22nd May, 1661; Sanders, 297).

(*a*) See 15 & 16 Vict. c. 86, ss. 2 and 3, p. 161, *ante*, by which the old subpœna is abolished.

Service by post. Where the subpœna was enclosed in a letter which the defendant admitted he had received, it was held insufficient, *Gathercote* v. *Wilkinson*, 1 De G. & Sm. 681; but service of a copy of the bill was held to be sufficient when the defendant admitted having received it by post, *Burton* v. *Shaw*, 10 L. T. N. S. 292, and service on a company by post is good service, see *infra*.

Service at chambers, office, &c. Service at the chambers of a barrister resident out of London, and having little or no business, was held insufficient (—— v. *Shaw*, cited in Hinde's Ch. Pr., p. 92). So service on a solicitor at his office is insufficient, unless under a special order (*Young* v. *Goodson*, 2 Russ. 255).

Member of family. The member of the family on whom service is effected must be an inmate of the house (*Edgson* v. *Edgson*, 3 De G. & S. 629).

Peers, M.P.'s, &c. Service on a peer, even though he be abroad, is properly effected by leaving the bill at his town-house (*Thomas* v. *Earl of Jersey*, 2 M. & K. 398; and see *Attorney-General* v. *Earl of Stamford*, 2 Dick. 744, there cited; and *Davidson* v. *Marchioness of Hastings*, 2 Keen, 509). Peers, whether Irish or English (*Robinson* v. *Lord Rokeby*, 8 Ves. 601), are entitled to letters missive. As to members of the House of Commons, see *East India Company* v. *Sir Thomas Rumbold*, Hinde, 91.

Married women. Service on the husband (even though a prisoner for debt at the time), is good service on the wife (*Holcombe* v. *Trotter*, 9 Jur. 637; *Gee* v. *Cottle*, 3 M. & Cr. 180). *Secus*, if the wife be deserted by or voluntarily living apart from him, *Holcombe* v. *Trotter*, l. c.; *Thomas* v. *Selby*, 9 Beav. 194; *Steele* v. *Plomer*, 1 M. & G. 83; *Dubois* v. *Hole*, 2 Vern. 713, where the demand was against the wife's separate estate, and see cases as to enforcing an answer from married women, note (*b*), p. 435, *post*; see, however, *Bromley* v. *Bank of England*, 7 Jur. 120, and as to service on married women out of the jurisdiction, see p. 425, *post*.

Infants. In *Christie* v. *Cameron*, 4 W. R. 589, service on the rector of the college of which an infant defendant was an under-graduate was held sufficient, the plaintiff being unable to discover where the defendant's father lived. So, service on an infant's mother (*Smith* v. *Marshall*, 2 Atk. 70), or step-father (*Thompson* v. *Jones*, 8 Ves. 141), may be allowed; and see as to serving infants previously to appointing a guardian *ad litem*, note (*g*), p. 402, *ante*.

Lunatics. The Court will not grant leave to substitute service on the medical officer of an asylum, where a lunatic defendant is confined (*Morgan* v. *Jones*, 4 W. R. 381); from which case it would seem, that service in such cases ought to be effected on the lunatic himself, in the presence of the medical officer. See, too, *Sheldrake* v. *Elliston*, 2 L. T. N. S. 48.

Prisoners. Service on the deputy-governor of a gaol where a defendant is a prisoner is good service (*Newenham* v. *Pemberton*, 2 Coll. 54).

Partners. Service on one of two partners is not good service on the other (*Young* v. *Goodson*, 2 Russ. 255); but see as to substituted service on a partner, note (*b*), p. 420, *post*.

Railway company. Service on a railway company (8 Vict. c. 20, s. 138), or joint-stock company (25 & 26 Vict. c. 89, ss. 62, 63), is well effected by the bill being left at or transmitted by post to the registered office of the company, or by being given personally to the secretary, or if there be no secretary to one of the directors.

Unincorporated companies, &c. In the case of an unincorporated company, service may be effected in the same way, except that if there be no secretary the solicitor may be served (8 Vict. c. 18, s. 134). As to substituted service on companies, see note (*b*), *post*.

Scotch company. Service at the London office of a Scotch company possessing large property in England is good service on the company (*Maclaren* v. *Stainton*, 16 Beav. 279).

I. *In the Case of Parties Generally.*

Rule 2. Substituted service.

2. The Court may direct substituted service (*b*) of a copy of a bill (*c*) to be served under the Stat. 15 & 16 Vict. c. 86, in cases in which, according to the practice of the court, existing at the time of the passing of that statute, substituted service of a *subpœna* to appear to and answer a bill might have been directed (22nd May, 1661; Sanders, 297).

(*b*) Substituted service was held good, though no order had been previously obtained, in *Re Paragon and Spero Mining Company*, 10 W. R. 76; *Martin* v. *Pycroft*, 5 W. R. 464. Substituted service.

Persons, who, not being parties, appear in any proceedings, may be served through their solicitors, except in matters of contempt, Ord. III. 7, *ante*. On persons not parties.

The application should be by *ex parte* motion, *Danford* v. *Cameron*, 8 Hare, 329; *Read* v. *Barton*, 28 L. T. 36; and it should be shown that every effort has been made to effect personal service, *Firth* v. *Bush*, 11 W. R. 611; see *Hope* v. *Carnegie*, 1 L. R. Eq. 126, (where substituted service was ordered, and the bill was also directed to be served at the residence of the defendant, personal service having been found impracticable). How to be applied for.

As to entering an appearance for an absconding defendant without any service personal or substituted, see rule 7, *infra*. Course where it cannot be effected.

Substituted service may be allowed, though the defendant is not absconding, but is residing permanently abroad, *Griffiths* v. *Cooper*, 2 D. F. J. 208. If defendant resides abroad.

Before the Court will direct substituted service, it must be proved that the person on whom it is sought to effect such service is the agent of the defendant for a purpose closely connected with the suit, *Bones* v. *Angier*, 2 W. R. 609, cited, under 15 & 16 Vict. c. 86, s. 5, p. 163, *ante*, and that there is *reasonable ground to believe that the service will come to the party's own knowledge*, *Hope* v. *Hope*, 19 Beav. 237; 4 D. M. G. 328; *Hunt* v. *Lever*, 5 Ves. 147; *Heald* v. *Hay*, 9 W. R. 359; *Dicker* v. *Clarke*, 11 W. R. 636. Service will be substituted on an *agent*.

A solicitor who has acted for the defendant in transactions connected with the subject-matter of the suit, is a sufficient agent for the purpose of substituting service, *Hope* v. *Carnegie*, 1 L. R. Eq. 126; thus in a suit to restrain the defendant's action at law, service was substituted on the attorney at law, *Sergison* v. *Beavan*, 9 Hare, App. xxix. (note); *Hurst* v. *Hurst*, 1 De G. & Sm. 694; *Howkins* v. *Bennett*, 1 Gif. 215; *Brooker* v. *Smith*, 4 L. T. N. S. 545 (which see as to the evidence necessary in support of the motion), and in a suit to make children wards of court, service was substituted on the mother's attorney in a divorce suit, *Hope* v. *Hope*, 19 Beav. 237; 4 D. M. G. 328; and, in general, service of proceedings in a supplemental suit may be substituted on the defendant's solicitor in the original suit, *Scott* v. *Wheeler*, 13 Beav. 239; *Norton* v. *Hepworth*, 1 M. & G. 54; and substituted service on the solicitor was ordered, though he objected to accept it, *Governors of Grey Coat Hospital* v. *Westminster, &c. Commissioners*, 4 Jur. N. S. 449. But the solicitor in a former suit is not the client's agent for the purpose of substituted service in a fresh suit, though relating to the same matter (*Hurst* v. *Hurst*, 1 De G. & Sm. 694), nor in a cross suit (*Waterton* v. *Croft*, 5 Sim. 502). On solicitor or attorney in matters connected with the suit. Not on a former solicitor.

A solicitor who had only written for a copy of the bill was not held sufficiently an agent for the purpose, *Asiatic Banking Company* v. *Anderson*, 13 L. T. N. S. 272; nor is the fact of a person being in communication with the absent party sufficient, *Watts* v. *Hughes*, 8 W. R. 292. Not on person merely in communication.

Where a defendant wilfully kept out of the way, and his solicitor admitted *Future proceedings.*

ORDER X. Service of Copy of Bill, and Appearance.

that he was in communication with him, V.-C. Wood made an order for service of *all future proceedings* on the solicitor, *Christie* v. *Cameron*, 3 W. R. 146 ; *Foster* v. *Menzies*, 16 Beav. 568 ; but see *Steel* v. *Gordon*, *ibid.* 158.

On a steward and particular agent.

Substituted service on stewards and agents of persons abroad was authorised by 4 & 5 Wm. 4, c. 82, sect. 1, *Cox* v. *Bannister*, 8 W. R. 206 ; *Carwardine* v. *Wisklade*, 15 Jur. 913 ; and generally substituted service upon an agent in respect of property the subject of the suit, is allowed, *Hobhouse* v. *Courtney*, 12 Sim. 140 ; *Morrit* v. *Walton*, 2 W. R. 643 ; *Cooper* v. *Wood*, 5 Beav. 391 ; *Murray* v. *Vipart*, 1 Ph. 521 ; *Weymouth* v. *Lambert*, 8 Beav. 333 ; *Jackson* v. *Shanks*, 13 W. R. 287 ; and see reporter's note to *Rickcord* v. *Nedriff*, 2 Mer. 458. *Secus*, where the agency was not proved, *Webb* v. *Salomon*, 3 Hare, 251. Substituted service on a general agent was allowed in *Jones* v. *Cargill*, 11 L. T. N. S. 566. On a solicitor with general power of attorney, in *Foster* v. *Menzies*, 16 Beav. 588, see *Barker* v. *Piele*, 11 W. R. 658. On a partner, *Carrington* v. *Cantillon*, Bunbury, 107 ; *Coles* v. *Gurney*, 1 Mad. 187 ; *Kinder* v. *Forbes*, 2 Beav. 503.

General agent.

Service how substituted on a company ;

As to substituted service in the case of a company whose office is closed, see *Gaskell* v. *Chambers*, 26 Beav. 262 ; *Re Petroleum Company*, 15 W. R. 29 ; *Re Unity, &c. Association*, 11 W. R. 355 ; *Re London and Westminster Wine Company*, 3 N. R. 26 ; *Ex parte Chifferiel*, 6 N. R. 349.

on trustees.

If trustees avoid service after naming a place where they may be served with notice of applications, service at such place is sometimes held sufficient, *Ex parte Baugham*, 16 Jur. 355 ; see note (*r*), p. 73, *ante*.

Process of substituting service.

A copy of the bill and of the order directing substituted service should be shown to the party served, *Jones* v. *Brandon*, 2 Jur. N. S. 437 ; see *Farrow* v. *White*, 1 J. & W. 643. And if a defendant does not appear after substituted service, the plaintiff should enter an appearance for him, and not move to commit him, *Hackwood* v. *Lockerby*, 7 D. M. G. 238.

Substituted service allowed, of bill of revivor ; of a traversing note ; of replication ;

(*c*) Substituted service will be allowed in a proper case, not only of the original bill but of subsequent proceedings, see *Foster* v. *Menzies*, and other cases cited last page. So substituted service is allowed of order of revivor and supplemental proceedings (note (*l*), p. 215, *ante*) ; of a traversing note (*Hunt* v. *Niblett*, 25 Beav. 124 ; *Scott* v. *Wheeler*, 13 Beav. 239; *Wallis* v. *Darby*, 6 Hare. 618 ; *Horlock* v. *Wilson*, 12 Beav. 545) ; of replication, by advertisement), *Barton* v. *Whitcombe*, 17 Jur. 81 ; *Anon.*, 1 W. R. 115; *Jenkyn* v. *Vaughan*, 3 Drew. 20 ; *Miller* v. *Elwin*, 4 Jur. N. S. 600 ; *Lechmere* v. *Clamp*, 29 Beav. 259 ; 30 Beav. 218) ; of "other process" (see note to rule 6, *infra*, *Skegg* v. *Simpson*, 2 De G. & Sm. 454, and cases collected in note thereto) ; and of decrees and orders (*Re Mourilyan*, 13 Beav. 84 ; *Roby* v. *Scholes*, 1 W. R. 118; *Re Dufaur*, 16 Beav. 113 ; *Rider* v. *Kidder*, 12 Ves. 202).

of decrees.

But service of notice of motion of decree may not be substituted, *Lechmere* v. *Clamp*, l. c.

Rule 3. Defendant within jurisdiction must appear eight days after service.

3. Where a defendant within the jurisdiction of the court is served with a copy of a bill (*d*) in a manner provided by the Stat. 15 & 16 Vict. c. 86, s. 3, he must appear thereto within eight days after the service of such copy of the bill (*e*) ; otherwise an appearance may be entered for him, as provided by the next Rule of this Order (8th May, 1845 ; Ord. 16, Art. 3).

Appearance by solicitor not duly qualified.

(*d*) An appearance entered by a defendant's solicitor who was duly entered on the rolls was not set aside because he had not taken out his yearly certificate, *Sparling* v. *Brereton*, 14 W. R. 515.

Appearance gratis.

As to appearing *gratis*, see Daniell, 497.

Appearance is not necessary in the case of persons served with notice of a decree under the 42nd sect. of the Chancery Amendment Act, 1852, *ante*, p. 196, see *Green* v. *Measures*, cited in note (*c*) thereto.

Nor where an order of revivor is made, need the parties who have appeared already put in a new appearance, note (*m*), p. 216, *ante*.

(*e*) A defendant need not appear to an amended bill, unless he is required or desires to answer the amended bill (see Ayckb. 86, *Barry* v. *Croskey*, 2 J. & H. 130).

Appearance by parties served. After revivor. Appearance to amended bill.

4. Where any defendant, *not* appearing to be an infant, or a person *of weak or unsound mind, unable of himself to defend the suit* is, when within the jurisdiction of the Court, duly served with a copy of the bill (*f*) under the Stat. 15 & 16 Vict. c. 86, s. 3, and refuses or neglects to appear thereto within eight days after such service, the plaintiff may, after the expiration of such eight days and within three weeks from the time of such service (*g*), apply to the Record and Writ Clerk to enter an appearance for such defendant; and no appearance having been entered, the Record and Writ Clerk shall enter such appearance accordingly, upon being satisfied by affidavit that the copy of the bill was duly served. And after the expiration of such three weeks, or after the time allowed to such defendant for appearing has expired, in any case in which the Record and Writ Clerk is not hereby required to enter such appearance, the plaintiff may apply to the Court for leave to enter such appearance for such defendant (*h*), and the Court being satisfied that the copy of the bill was duly served, and that no appearance has been entered for such defendant, may, if it so thinks fit, order the same accordingly (*h*) (8th May, 1845; Ord. 29).

Rule 4. Appearance may be entered by plaintiff for defendant, within jurisdiction, not being an infant or person of unsound mind.

(*f*) Substituted service has been held due service on a defendant for the purpose of this section, *Steele* v. *Plomer*, 1 M. & G. 83; *Wilcoxon* v. *Wilkins*, 11 W. R. 868; but see *Dicker* v. *Clarke*, *ibid.* 765; and as to substituted service of an amended bill on the solicitor of the defendant, the defendant himself being resident out of the jurisdiction, see *Zulueta* v. *Vinent*, 3 M. & G. 246 (overruling *Marquis of Hertford* v. *Suisse*, 13 Sim. 439; and *Sewell* v. *Godden*, 1 De G. & Sm. 126), cited in note (*f*), p. 417, *ante*.

Appearance entered for defendant after substituted service.

(*g*) When the plaintiff had accidentally allowed the three weeks limited by the order to pass and the defendant had subsequently to the service gone abroad, the Court extended the time, *Clarkson* v. *Eldridge*, 8 W. R. 466; but after a long and unexplained delay (*Norton* v. *Fisk*, 15 Jur. 1027; *Totty* v. *Ingleby*, 7 Beav. 591; *Bradstock* v. *Whatley*, *ibid.* 346), the application cannot be made without fresh service of the bill or notice of motion (*Edmonds*

Accidental delay in entering appearance for defendant.

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v. *Nicoll*, 6 Beav. 334; *Radford* v. *Roberts*, 2 Hare, 96; *Walker* v. *Hurst*, 15 L. J. Ch. 72).

(*h*) For form of order, see *Burton* v. *Tebbutt*, 14 L. T. N. S. 511; Seton, 1247-8.

Appearance may be entered though jurisdiction is denied.

The Court will not, upon the question whether an appearance shall be entered for a defendant, enter into the question whether it has jurisdiction to entertain the suit, *Felkin* v. *Lord Herbert*, 1 Drew. & Sm. 608.

As to the plaintiff's proper course if the defendant, after appearance entered for him, neglects to put in any answer, see note (*a*), p. 433, *post*.

Process after entering appearance.

Rule 5. Appearance entered for infant or defendant of unsound mind void.

5. Any appearance entered at the instance of the plaintiff for a defendant, who, at the time of the entry thereof, is an infant or a person of weak or unsound mind, unable of himself to defend the suit, is irregular, and of no validity (*i*) (8th May, 1845; Ord. 30).

(*i*) See *Leese* v. *Knight*, 10 W. R. 711; and for the regular mode of proceeding, see Ord. VII. 3, p. 400, *ante*.

Rule 6. Appearance may be entered by plaintiff for absconding defendant.

6. Where the Court is satisfied by sufficient evidence that any defendant (*k*) has been within the jurisdiction of the Court at some time not more than two years (*l*) before the bill was filed, and that such defendant is beyond the seas, or that, upon inquiry at his usual place of abode (if he had any), or at any other place or places where at the time when the bill was filed he might probably have been met with, he could not be found so as to be served with a copy of the bill, under the Stat. 15 & 16 Vict. c. 86, s. 3, and that in either case there is just ground to believe that such defendant has gone out of the realm or otherwise absconded to avoid being served with such copy of the bill or with *other process* (*m*), the Court may order that such defendant do appear at a certain day to be named in the order; and that a copy of such order, together with a notice to the effect set forth at the end of this Rule, may within fourteen days (*n*) after such order made, be inserted in the "London Gazette," and be otherwise published as the Court shall direct. And where the defendant does not appear within the time limited by such order, or within such further time as the Court may appoint, there, on proof made of such publication of the said order, the Court may order an appearance to be entered for the defendant on the application of the plaintiff.

Officer of Court.

Notice.—"A. B., take notice, that if you do not appear pursuant to the above order, the plaintiff may enter an appearance for you, and the Court may afterwards grant to the plaintiff such relief as he may appear to be entitled to on his own showing" (8th May, 1845; Ord. 31).

(*k*) A defendant for whom the plaintiff moves to enter an appearance as an *absconding* defendant under this rule, ought not to be *described* in the bill as "out of the jurisdiction," *Merriman* v. *Goodman*, 1 W. N. (1866), 46. "Out of the jurisdiction."

A party who, after judgment has been recovered against him, takes advantage of a stay of execution to convert his personal property into money, and go abroad, after his creditor has given him notice that he intends to file a bill to enforce the judgment against his real estate, is an absconding defendant within this rule, *Cope* v. *Russell*, 2 Ph. 404; and the fact that he has absconded to avoid service of *any legal process* (whether criminal or civil, *Allen* v. *Loder*, 20 L. J. Ch. 658), which may be issued against him, is sufficient to bring him within it, *Barton* v. *Whitcome*, 16 Beav. 205; and see *Bennett* v. *Powell*, 2 W. R. 667. Where a defendant against whom a breach of trust is charged has gone abroad, the Court will allow an appearance to be entered for him under this rule (*Crosse* v. *Crosse*, 8 W. R. 338). "Absconding defendant."

(*l*) Where a defendant more than two years before bill filed has been out of the jurisdiction of the Court, and has no solicitor, agent, or other person, within the jurisdiction, upon whom substituted service can be made, and he cannot be found or heard of out of the jurisdiction, it would appear that the plaintiff cannot, either under this rule or otherwise, obtain leave to enter an appearance for him as a preliminary step to having the bill taken *pro confesso* (*Thurlow* v. *Treeby*, 27 Beav. 624); this seems to form a *casus omissus* from the orders. When defendant abroad more than two years.

(*m*) Under this head substituted service of a traversing note, replication, &c., is allowed, see note (*c*), p. 420, *ante*.

(*n*) These fourteen days were extended in *Dicker* v. *Clarke*, 11 W. R. 870.

7. Where a defendant in any suit (*o*) is out of the jurisdiction of the Court. Rule 7. Service of copy of bill and of interrogatories on defendant out of jurisdiction.

(1.) The Court, upon application supported by such evidence (*p*) as shall satisfy the Court in what place or country such defendant is or may probably be found, may order that a copy of the bill (*q*) under the Stat. 15 & 16 Vict. c. 86, s. 3, and, if an answer is required, a copy of the interrogatories, may be served on such defendant (*r*) in such place or country, or within such limits as the Court shall think fit to direct (*s*). Article (1).

(2.) Such order shall limit a time after such service within which such defendant is to appear to the bill; such time to depend on the place or country within which the copy of the bill is to be served. And where an answer is required, such order shall also limit a time within which such defendant is to plead, answer, or Article (2).

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demur, or obtain from the Court further time to make his defence to the bill (*t*).

Article (3).

(3.) At the time when such copy of the bill shall be served, the plaintiff shall also cause such defendant to be served with a copy of the order giving the plaintiff leave to serve such copy of the bill.

Article (4).

(4.) And if, upon the expiration of the time for appearing, it be shown to the satisfaction of the Court that such defendant was duly served with such copy of the bill and with a copy of the order, the Court may, upon the application of the plaintiff, order an appearance to be entered for such defendant (8th May, 1845; Ord. 33).

Appearance may be entered for such defendant.

Service out of jurisdiction may be ordered in any suit.

(*o*) It is now settled that this rule gives the Court power to order service on a defendant out of the jurisdiction, *in any suit*, *Drummond* v. *Drummond*, 2 L. R. Eq. 335; 2 L. R. Ch. 32, overruling *Cookney* v. *Anderson* (*infra*).

Statutory powers of service out of jurisdiction previously to the order.

Before the 33rd order of 8th May, 1845, the only enactments by which a defendant could be effectually served out of the jurisdiction were 2 Wm. 4, c. 33, and 4 & 5 Wm. 4, c. 82 (previously to which a subpœna might be served out of the jurisdiction, but unless the party served chose to appear, the suit could not be proceeded with as against him).

2 W. 4, c. 33.

By 2 Wm. 4, c. 33, it was made lawful for the Court of Chancery or Exchequer in England, in any *suit relating to land* in England or Wales, to order its process to be served on a defendant residing within any part of the United Kingdom, and in the Isle of Man; and a similar power was given to the Court of Chancery and Exchequer in Ireland, in suits relating to land in Ireland.

4 & 5 W. 4, c. 82.

By 4 & 5 Wm. 4, c. 82, power was given to the Court of Chancery or Exchequer in England and Ireland respectively, in suits concerning land in England and Ireland respectively, or concerning any *charge, lien, judgment, or incumbrance thereon, or concerning any money vested in any government or public stocks, or shares in public companies or concerns, or the dividends or produce thereof*, to order its process to be served on a defendant residing in any place out of the United Kingdom.

In these Acts "United Kingdom" included Scotland, *Cameron* v. *Cameron*, 2 M. & K. 292.

New order under authority of Acts of Parliament.

The 33rd rule of the General Orders of May, 1845 (on which this rule is founded), was framed by the Lord Chancellor and the Judges of Chancery under the authority of the 3 & 4 Vict. c. 94, and 4 & 5 Vict. c. 52 (Acts for facilitating the administration of justice in the Court of Chancery, 1840 and 1841), and the Court was by that rule authorised to serve its process on a defendant out of the jurisdiction *in any suit*.

Cookney *v.* Anderson.

In *Cookney* v. *Anderson*, 31 Beav. 452; 1 D. J. S. 365; and *Foley* v. *Maillardet*, 1 D. J. S. 389. Lord Westbury held that the Lord Chancellor and Judges had no power to extend the extra territorial jurisdiction of the Court further than the legislature had already extended it by the Acts of Wm. 4, and therefore that this rule applied to no suits except those specified in those Acts, *e. g.* it was held not to apply to a suit for dissolution of partnership, *Baillie* v. *Blanchet*, 4 N. R. 48, or for payment of a legacy where the defendant had no property within the jurisdiction, *Foley* v. *Maillardet* (l. c.); and see *Dodd* v. *Webber*, 2 Beav. 502; *Green* v. *Pledger*, 3 Hare, 165. See, however, remarks of Lord Romilly, M. R. in *Official Manager of National Insurance Association* v. *Carstairs*, 2 N. R. 348.

Drummond *v.* Drummond.

The full Court of Appeal has now decided in *Drummond* v. *Drummond* (l. c.)

where the cases are reviewed, that the Court has jurisdiction to order service of the bill out of the jurisdiction in any suit.

See generally as to the discretion of the Court in allowing service of the bill abroad, the remarks of Lord Chelmsford and L. J. Turner, in *Drummond* v. *Drummond*, 2 L. R. Ch. 32, 37, 46. The order will not be made if there are no means of effectually reaching the defendant, *Steele* v. *Stewart*, 1 H. & M. 793; but see *Innes* v. *Mitchell*, 1 De G. & J. 423; *Meiklan* v. *Campbell*, 24 Beav. 100; *Cook* v. *Wood*, 7 W. R. 424. Court's discretion to allow it.

And the defendant may enter a conditional appearance and apply to have the order set aside by showing that it was not in accordance with the rules of the Court, or that the allegations in the bill on which the order was founded were untrue, *Haywarden* v. *Dunlop*, 2 Dr. & Sm. 155; *Maclean* v. *Dawson*, 27 Beav. 25; 4 De G. & J. 150; Seton, 1249. But see *Tracy* v. *Smith*, 11 W. R. 458. Defendant may resist it.

(*p*) The Court will look at the bill to satisfy itself that the case made by the plaintiff is not on the face of it absurd, *Maclean* v. *Dawson*, 27 Beav. 25; 4 De G. & J. 150, 157. So the circumstances need not be stated in the plaintiff's affidavit, *Brooke* v. *Morison*, 32 Beav. 652; and see last note as to the discretion of the Court in granting the application and the right of the defendant to apply to set it aside. Evidence required.

As to what affidavits in support of the application are required, see *Blenkinsop* v. *Blenkinsop*, 2 Ph. 1; *Fieske* v. *Buller*, 7 Beav. 581; *Preston* v. *Dickinson*, 9 Jur. 919; *Whitmore* v. *Ryan*, 4 Hare, 612; *Joseph* v. *Tyndall*, 13 L. J. Ch. 23.

(*q*) Leave is generally obtained to serve interrogatories at the same time, *Leaman* v. *Brown*, 7 W. R. 322; and as to service of interrogatories as a preliminary step to taking the bill *pro confesso*, see note (*d*) to Ord. XXII. 2. Service out of jurisdiction,

The order in terms only permits service of the bill and interrogatories on a defendant out of the jurisdiction, and service of process subsequent thereto has been in the older cases refused; *e. g.*, a traversing note was not allowed to be served out of the jurisdiction, *Anon.*, 11 Jur. 28; *Anderson* v. *Stather*, *ibid.* 96; and though a more liberal construction has lately been placed on the order, special leave is necessary to serve notices of motion out of the jurisdiction, *Weguelin* v. *Lawson*, 8 L. T. N. S. 763; see, too, *Hasluck* v. *Stewart*, 6 Sim. 321; *Green* v. *Pledger*, 3 Hare, 165; *Haywarden* v. *Dunlop*, l. c.; *Godson* v. *Cook*, 7 Sim. 519. of interrogatories, of subsequent process, of notices of motion,

Notice of motion for decree has been allowed to be served on a defendant out of the jurisdiction, *Meek* v. *Ward*, 10 Hare, App. lv.; *Middleton* v. *Chichester*, 1 N. R. 255. of motion for decree,

So has notice of a decree, under 15 & 16 Vict. c. 86, s. 42 (see note (*b*), p. 197, *ante*).

So has notice of replication, *Lanham* v. *Pirie*, 2 Jur. N. S. 1201; *Heath* v. *Lewis*, 2 W. R. 488. of replication,

An administration suit instituted by summons is within the order, *Re Alcan*, 1 D. J. S. 398, reversing *Lester* v. *Bond*, 1 Dr. & Sm. 394; but not, it seems, a petition under the Trustee Relief Act, *Ex parte Bernard*, 6 Ir. Ch. Rep. 133. As to service out of the jurisdiction in suits instituted in the Palatine Court, see *Waltham* v. *Goodyear*, 7 D. M. G. 77; *Wynne* v. *Hughes*, 26 Beav. 377; *Downes* v. *Jackson*, 14 W. R. 907. of administration summons, *not* of petition.

If the defendant absconds and refuses to answer after being served out of the jurisdiction, the plaintiff may proceed to take the bill *pro confesso* under the modern practice, see Ord. XXII. *post*.

(*r*) As to service of the bill on one person for several, see *Jones* v. *Geddes*, 9 Jur. 1002. Service out of jurisdiction on one for several.

Service on a husband out of the jurisdiction has been held good service on the wife, *Steele* v. *Plomer*, 2 Ph. 782, note, 1 M. & G. 83; but where the husband was of unsound mind, both he and his wife were served, *Biddulph* v. *Lord Camoys*, 7 Beav. 580. Husband for wife.

Leave may be given to serve infants out of the jurisdiction, *Anderson* v. *Stather*, 10 Jur. 383 (decided under the Acts of Wm. 4), and persons of unsound mind, *Biddulph* v. *Lord Camoys* (*supra*). As to service on a company out of the jurisdiction, see *Lewis* v. *Baldwin*, 11 Beav. 153; and as to Infants. Lunatics. Companies.

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service of a letter missive on a peer out of the jurisdiction, see *Anon.*, 18 L. J. Ch. 229.

(*s*) The service need not be limited to any particular spot; thus leave was given to serve the defendant "in Scotland," *Blenkinsop* v. *Blenkinsop*, 2 Ph. 1; in the Grand Duchy of Baden, *Preston* v. *Dickinson*, 9 Jur. 919.

Peers.

Form of order.

Time for demurrer how limited.

(*t*) The order is to limit a time which must be specified in the indorsement on the bill (note (*e*), p. 162, *ante*), "to plead, answer, or demur, not demurring alone." In *Grüning* v. *Prioleau*, 33 Beav. 221, a defendant served out of the jurisdiction had six weeks allowed "to plead, answer, or demur, not demurring alone." After the expiration of the six weeks he appeared, and within twelve days after appearance he demurred to the whole bill, and it was held he could do so according to the common rule (Ord. XXXVII. rule 3, *post*), so that the rule in the text does not refer to the case of a defendant demurring alone. See further as to the time allowed, *Whitmore* v. *Ryan*, 4 Hare, 612; *Brown* v. *Stanton*, 7 Beav. 582.

Rule 8. Affidavits of service, to state particulars of service.

8. Affidavits filed for the purpose of proving the service of a copy of a bill upon any defendant shall state when, where, and how the same was served, and by whom such service was effected (8th May, 1845; Ord. 34) (*u*).

(*u*) See, before the rule, *Davis* v. *Hole*, 1 Y. & C. C. C. 440; where this rule has not been complied with, the writ of attachment will be set aside as irregular (*Bickford* v. *Skewes*, 9 Sim. 428).

Rule 9. Appearance may afterwards be entered by defendant.

9. A defendant, notwithstanding that an appearance may have been entered for him by the plaintiff, may afterwards enter an appearance for himself in the ordinary way; but such appearance by such defendant shall not affect any proceeding duly taken or any right acquired by the plaintiff under or after the appearance entered by him, or prejudice the plaintiff's right to be allowed the costs of the first appearance (8th May, 1845; Ord. 36) (*v*).

(*v*) See *Price* v. *Webb*, 2 Hare, 511.

Rule *10. No attachment for want of appearance without special order.

No messenger or serjeant-at-arms to compel appearance.

*10. No attachment for want of appearance shall hereafter be issued, without a special order of the Court (*w*), and no order shall be made for a messenger, or for the serjeant-at-arms, to take the body of the defendant, for the purpose of compelling him to appear to the bill (26th Aug. 1841; Ord. 7).

(*w*) The first part of this order is new; as to the latter part, see *Hinde* v. *Blake*, 12 L. J. Ch. 56.

How appearance of defend-

The appearance of a defendant might be enforced before this rule by attachment, under 1 Wm. 4, c. 36, sect. 3. And it was provided by the 11th sect. of

that Act, that if any defendants brought into Court by *habeas corpus* or otherwise, in custody, after fourteen days' previous notice in writing, requiring them to enter an appearance, refused to do so, or to appoint an attorney, the Court might enter appearance for them, see *Collins* v. *Brown*, 1 Hare, 315; *Ansdell* v. *Whitfield*, 6 Sim. 356; *Williams* v. *Jones*, 8 Sim. 471. As to attachment generally, see Seton, 1230; Ayckb. 56; Daniell, 420.

Since the orders now allow a plaintiff to enter an appearance for the defendant (rule 4, *supra*, p. 421), and afterwards to proceed to take the bill *pro confesso*, see note (*a*), p. 433, *post*, the leave of the Court to issue an attachment for want of appearance is rarely applied for, and the process is almost obsolete. Such leave was refused in *Hackwood* v. *Lockerby*, 7 D. M. G. 238, cited p. 420, *ante*, where, however, the service was substituted.

Defendant might be compelled.

More usual now to enter appearance for defendant and take bill pro confesso.

II. *In the case of Formal Parties.*

Rule 11. Service of copy of bill on parties against whom no direct relief is sought.

11. (*x*) Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, it shall not be necessary for the plaintiff to require such party, not being an infant, to appear to the bill (*y*), but the plaintiff shall be at liberty to serve such party, not being an infant, with a copy of the bill, whether the same be an original, or amended, or supplemental bill, without any indorsement requiring such party to appear thereto; and such bill, as against such party, shall pray that such party, upon being served with a copy of the bill, may be bound by all the proceedings in the cause (*z*). But this Rule shall not prevent the plaintiff from requiring a party against whom no account, payment, conveyance, or other direct relief is sought, to appear to the bill, or from prosecuting the suit against such party in the ordinary way, if he shall think fit (26th Aug. 1841; Ord. 23).

(*x*) The provisions of the 42nd section of the 15 & 16 Vict. c. 86, *ante*, p. 195, materially diminishing the number of necessary parties to a suit, and of the earlier sections dispensing with the necessity for an answer in many cases, have practically reduced the operation of this rule.

Necessity for rule diminished.

The Attorney-General is not a defendant within this rule (*Christopher* v. *Cleghorn*, 8 Beav. 314); and it has been held not to apply to parties out of the jurisdiction, their case being provided for by rule 7, *supra* (*Lorton* v. *Kingston*, 2 M. & G. 139).

Attorney-General. Party resident abroad.

The Court refused to allow substituted service under this rule, *Thomas* v. *Selby*, 9 Beav. 194.

In *Johnson* v. *Tucker*, 15 Sim. 485, where a *cestui que trust* filed a bill against trustees, for an account and appointment of new trustees, the other *cestuis que trusts* being necessary parties were held to be within this rule, see *Knight* v. *Cawthorn*, 1 De G. & Sm. 714; *Powell* v. *Cockerell*, 4 Hare, 557; *Davis* v. *Davis*, 4 Hare, 389; *Abram* v. *Ward*, 6 Hare, 170; *Lloyd* v. *Lloyd*, 1 Y. & C. C. C. 181. And in *Duncombe* v. *Levy*, 5 Hare, 236, a debtor filed a bill against creditors, parties to a trust deed, which he had executed for their benefit, charging that one of the creditors had forfeited his debt; the other creditors were held to be within this rule, and V.-C. Wigram said,

To what parties the rule applies.

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that as the subsequent orders (see rule 14, *infra*) enabled them to have the suit prosecuted against them in the common way if they desired, it was for their benefit that the order should be held to apply to them. And see *Bateman* v. *Margerison*, 6 Hare, 496.

Rule does not apply to defendants not in same interest as plaintiff.

But judgment creditors, parties to a foreclosure suit, were held not to be within the order, *Adams* v. *Paynter*, 8 Jur. 1063; and see *Knight* v. *Pocock*, 24 Beav. 436. And other defendants, not in the same interest as the plaintiff, were held not to be within the order, *Marke* v. *Locke*, 2 Y. & C. C. C. 500; *Barkley* v. *Lord Reay*, 2 Hare, 306; *Penfold* v. *Kelly*, 12 W. R. 286.

Practice as to service under the rule.

It was held that a defendant served under this rule must be re-served if the bill was amended (*Vincent* v. *Watts*, 3 M. & G. 248); but that if an order to extend the time for service was obtained under the 18th rule, a copy of such order need not be served with a copy of the bill (*Fenton* v. *Clayton*, 15 Sim. 82).

Costs.

If the plaintiff requires a party who might have been served with a copy of the bill to appear and answer, he will be made to pay the costs occasioned thereby (Ord. XL. 16, *post*).

Bill of revivor, &c.

(*y*) A bill of revivor and supplement has been held to be within the rule (*Walcot* v. *Walcot*, 10 Beav. 20); see, now, note (*l*), p. 215, *ante*.

(*z*) See *Gibson* v. *Haines*, 1 Hare, 317; *Smith* v. *Groves*, 9 Jur. 503.

As to serving parties under the modern practice with notice of a decree, see 15 & 16 Vict. c. 86, s. 42, rule 8, and notes thereto (p. 196, *ante*).

Co-defendants.

For the effect of this rule as between co-defendants, see *Boyd* v. *Moyle*, 2 Coll. 316.

Rule 12. Memorandum of service of copy of bill.

12. Where a plaintiff serves a defendant with a copy of the bill under the 11th Rule of this Order, he shall cause a memorandum of such service (*a*) and of the time when such service was made to be entered in the Record and Writ Clerk's Office, first obtaining an order of the Court for leave to make such entry, which order shall be obtained upon motion without notice, upon the Court being satisfied of a copy of the bill having been so served, and of the time when the service was made (26th Aug. 1841; Ord. 24).

Defendant wrongly named.

(*a*) Where the defendant served has been wrongly named in the copy of the bill, leave will, on the production of proper evidence as to identity, be given to enter a memorandum of service with the name of the defendant correctly stated in it (*Glover* v. *Cockerell*, 9 Jur. 860; *Witham* v. *Salvin*, 16 Jur. 420).

No memorandum necessary when defendant appears.

When a defendant appears no memorandum of service is necessary (*Attorney-General* v. *Donnington Hospital*, 12 Beav. 551, see *Maude* v. *Copland*, 1 Coll. 505).

What must be shown on motion to enter memorandum of service.

To support a motion under this rule it is necessary to show the nature of the suit and whether the service is personal or not (*Haigh* v. *Dixon*, 1 Y. & C. C. C. 180). In *Davis* v. *Prout*, 5 Beav. 102, it was held that an affidavit must be produced to show whether any account, &c., is sought against the defendant served, see rule 11. But see *Wawhood* v. *Labouchere*, 12 Sim. 362, where it was held that such affidavit was unnecessary; and *Hudson* v. *Dungworth*, 3 Hare, 508, where the order was made on the statement of counsel that the bill as settled by him contained no such prayer.

On formal defendant.

In *Goodwin* v. *Bell*, 1 Y. & C. C. C. 181, it was said by V.-C. Knight Bruce, that there must be some evidence that the party served is not an infant; but

this decision is said to have been overruled, 2 Y. & C. C. C. 166 (*Welch* v. *Welch*, 1 Hare, 593; *Sherwood* v. *Rivers*, 2 Y. & C. C. C. 166).

The affidavit is insufficient if its title omits the name of a defendant, though no process be prayed against him (*Lay* v. *Prinsep*, 1 De G. & Sm. 630).

Rule 13. Defendant served with copy of bill bound by proceedings.

13. Where a defendant is served with a copy of the bill, under the 11th Rule of this Order, and a memorandum of such service is duly entered, and such defendant does not within the time limited by the practice of the Court for that purpose, enter an appearance in common form, or a special appearance under the 15th Rule of this Order, the plaintiff shall be at liberty to proceed in the cause, as if the party served with a copy of the bill were not a party thereto, and the party so served shall be bound by all the proceedings in the cause in the same manner as if he had appeared to and answered the bill (26th Aug. 1841; Ord. 25) (*b*).

Defendant served and not appearing cannot demur.

(*b*) A defendant served under rule 11, who has not entered an appearance, but after the hearing is served with a copy of the bill as amended in pursuance of leave given at the hearing, cannot in that stage of the proceedings demur to the amended bill (*Powell* v. *Cockerell*, 4 Hare, 565).

Rule 14. Party so served may enter appearance, and have suit prosecuted in ordinary way on payment of costs occasioned thereby.

14. Where a party served with a copy of the bill under the 11th Rule of this Order, desires the suit to be prosecuted against him in the ordinary way, he shall be entitled to have it so prosecuted; and in that case he shall enter an appearance in the common form, and the suit shall then be prosecuted against him in the ordinary way. But the costs occasioned thereby shall be paid by the party so appearing, unless the Court shall otherwise direct (26th Aug. 1841; Ord. 26) (*c*).

(*c*) See note to *Lewis* v. *Clowes*, 10 Hare, App. lxii.

Rule 15. Such party may enter special appearance, and be served with notice of all proceedings on payment of costs occasioned thereby.

15. Where a party served with a copy of the bill under the 11th Rule of this Order, desires to be served with a notice of the proceedings in the cause, but not otherwise to have the same prosecuted against himself, he shall be at liberty to enter a special appearance in the following form: (that is to say), "*A. B.* appears to the bill for the purpose of being served with notice of all proceedings therein." And thereupon the party entering such appearance shall be entitled to be served with notice of all pro-

ORDER X. Service of Copy of Bill, and Appearance.

ceedings in the cause and to appear thereon (*d*). But the costs occasioned thereby shall be paid by the party entering such appearance, unless the Court shall otherwise direct (26th Aug. 1841; Ord. 27).

(*d*) Notices given under this rule require the same time to be given as notices to a defendant who is bound to answer (*Wilten* v. *Rumbell*, 8 Jur. 236).

Rule 16. Order for party served to enter common or special appearance.

16. No party shall enter either a common or special appearance under the 14th or 15th Rule of this Order, after the expiration of twelve days from the service of the copy of the bill, without first obtaining an order of the Court for that purpose; such order to be obtained on notice to the plaintiff, and to be granted, if the Court shall think fit, upon such terms as are just. And any party so entering such common or special appearance shall be bound by all the proceedings in the cause prior to such appearance being entered, unless the Court shall otherwise direct (8th May, 1845; Ord. 37; and Ord. 16, Art. 5) (*e*).

On appearance he will be bound by prior proceedings.

Prior proceedings.

(*e*) A motion for leave to enter an appearance *without being bound by prior proceedings* was refused in *Boreham* v. *Bignall*, 4 Hare, 633; and see *Rigby* v. *Strangways*, 10 Jur. 998, where leave was refused altogether.

Rule 17. Copy of bill to be served within 12 weeks from filing.

17. The service of a copy of a bill upon a defendant, under the 11th Rule of this Order, shall be of no validity if not made within twelve weeks from the filing of such bill, unless the Court shall give leave for such service to be made after the expiration of such twelve weeks (8th May, 1845; Ord. 16, Art. 2) (*f*).

Delay in service of bill on formal defendant.

(*f*) Where a copy of the bill was served after the twelve weeks, the Court, on the joint application of the plaintiff and the defendant served, gave leave to enter a memorandum of service (*Tugwell* v. *Hooper*, 10 Beav. 19). Liberty to serve the copy bill was given after great delay, where it was shown to have been accidental (*Bell* v. *Hastings*, 7 Beav. 592). *Secus* if the delay be unexplained (*Horry* v. *Calder*, 7 Beav. 585).

Rule 18. Service of copy of bill after the 12 weeks.

18. Where the plaintiff omits to serve any defendant with a copy of the bill under the 11th Rule of this Order, within twelve weeks from the filing of such bill, the Court may, if it shall think fit, upon the motion of the plaintiff, without notice, give the plaintiff leave to serve such de-

fendant with such copy, within such time and upon such terms as to the Court shall seem just (8th May, 1845; Ord. 28) (*g*).

ORDER X. Service of Copy of Bill, and Appearance.

(*g*) Where the time has been enlarged under this rule, it is not necessary to serve the defendant with the order enlarging the time (*Fenton* v. *Clayton*, 15 Sim. 82). An application to serve a defendant under this rule, *after decree*, for the purpose of binding him thereby, was refused, *Penfold* v. *Kelly*, 12 W. R. 286.

Service on formal defendants.

ORDER XI.

ORDER XI. Interrogatories.

Interrogatories (*a*).

1. The interrogatories for the examination of the defendant to a bill may be in a form similar to the form set out in Schedule (B.), with such variations as the nature and circumstances of each particular case may require (7th Aug. 1852; 1st Set, Ord. 15).

Rule 1. Form of interrogatories.

(*a*) For the form of interrogatories for examination of defendant, see Schedule B. (Appendix, p. iii. *post*), and for the practice as to interrogatories to original and amended bills, see p. 167, *ante*.

Different kinds of interrogatories.

As to cross interrogatories for examination of plaintiff, see p. 177; and as to interrogatories for the examination of witnesses in chambers, see p. 152, *ante*.

As to amending interrogatories, see *Rooper* v. *Harrison*, 2 W. R. 510; Daniell, 444.

Amendment of interrogatories.

As to filing interrogatories for the purpose of taking the bill *pro confesso*, when defendant absconds, see *Baker* v. *Dean*, 6 W. R. 719; *Butler* v. *Matthews*, 19 Beav. 549; *Wilkins* v. *Hogg*, 30 L. J. Ch. 492, Ord. XXII. r. 2, note (*g*), *post*.

When defendant absconds.

2. Where the plaintiff requires an answer to any bill from any defendant or defendants thereto, the interrogatories for the examination of such defendant or defendants shall be filed within eight days after the time limited for the appearance of such defendant or defendants (7th Aug. 1852; 1st Set, Ord. 16) (*b*).

Rule 2. Time for filing.

(*b*) By Ord. X. 3 (p. 420, *ante*), the time limited for appearance is eight days. The words "any bill" mean either an original or an amended bill. Where, therefore, a plaintiff requires an answer to an amended bill, he must file his interrogatories within eight days from the time limited for the defendant's appearance to such bill; as to what interrogatories are allowed to an amended bill, see note (*j*), p. 411, *ante*; as to enlarging the time, see next section.

Interrogatories to amended bill.

It is submitted that under this rule the plaintiff is not bound to delay filing or delivering interrogatories until the time allowed for appearing has expired, *where the defendant has voluntarily appeared before that time*; but that in that case he may file and deliver the interrogatories immediately after appearance.

Time for filing.

ORDER XI. Interrogatories.

Where a defendant is out of the jurisdiction (and *semble* in pressing cases), the interrogatories may by special leave be served with the bill (*Leaman* v. *Brown*, 7 W. R. 322).

Interrogatories filed with bill.

A plaintiff is bound to file his interrogatories within the time fixed by this order, though his bill has been demurred to, *Harding* v. *Tingey*, 12 W. R. 817.

Rule *3. Leave to file after time expired, how obtained.

* 3. After the expiration of eight days from the time limited for the appearance of any defendant, no interrogatories shall be filed for the examination of such defendant, without special leave of the Court or judge in chambers, to be applied for upon notice of motion or by summons (7th Aug. 1852 ; 1st Set, Ord. 20) (*c*).

Enlargement of time.

(*c*) The Court will, on an application, with notice to the other side, enlarge the time, if a proper cause for so doing be shown (*Empson* v. *Rowley*, 2 Sm. & G., App. iii.) ; but see *Denis* v. *Rochussen*, 6 W. R. 265. It appears that the plaintiff must always pay the costs of such an application himself. See *Dakins* v. *Garrett*, 4 Jur. N. S. 579, where they were fixed at 50 shillings. In a note to this case, it is stated that, *where the parties consent*, the chief clerk in chambers has power to extend the time for filing interrogatories. Under this rule, the application for time may *in all cases* be made in chambers.

Rule 4. Delivery of interrogatories, where defendant appears within time allowed for appearance.

4. Where a defendant or defendants required to answer shall appear in person or by his or their own solicitor or solicitors within the time limited for that purpose by the rules of the Court, the plaintiff shall, within eight days after the time allowed for such appearance, deliver (*d*) to such defendant or defendants, or to his or their solicitor or solicitors, a copy of the interrogatories so filed as aforesaid or of such of them as the particular defendant or defendants shall be required to answer. And the copy so to be delivered shall be examined with the original, and the number of folios counted by the Clerks of Records and Writs, who, on finding that such copy is duly stamped and properly written, shall mark the same as an office copy (7th Aug. 1852 ; 1st Set, Ord. 17).

"Delivery."

Evidence of delivery.

(*d*) In *Bowen* v. *Price*, 2 D. M. G. 899, overruling s. c. 1 Drew. 307, it was held that a copy of the interrogatories left at the office of the defendant's solicitor was *delivered* within the meaning of the Order. In a recent case, an indorsed memorandum of service in the handwriting of a clerk of the defendant's solicitor (the writer being abroad), coupled with an affidavit by another clerk, that the defendant's solicitor had admitted to him verbally the service of the interrogatories, was held sufficient to justify the Court in ordering an attachment to issue for want of answer (*Sidebottom* v. *Atkins*, 6 W. R. 97).

Rule 5.

5. Where a defendant to a suit commenced by bill does

ORDER XI. Interrogatories

Where defendant does not appear within time limited for appearance.

not appear in person or by his own solicitor within the time allowed for that purpose by the rules of the Court, and the plaintiff files interrogatories for his examination, the plaintiff may deliver a copy of such interrogatories so examined and marked as aforesaid to such defendant, at any time after the time allowed to such defendant to appear, and before his appearance in person or by his own solicitor; or the plaintiff may deliver a copy of such interrogatories so examined and marked as aforesaid, to the defendant or his solicitor, after the appearance of such defendant in person or by his own solicitor, but within eight days after such appearance (7th Aug. 1852; 1st Set, Ord. 18).

ORDER XII.

ORDER XII. Process for Want of Answer.

Process for Want of Answer (*a*).

Rule 1. Attachment for want of answer when defendant means to abscond.

1. Where there is just reason to believe that any defendant (*b*) means to abscond before answering the bill, the Court may, on the *ex parte* application of the plaintiff, at any time after an appearance has been entered for him by the plaintiff, order an attachment for want of answer to issue against him; and such attachment shall be made returnable at such time as the Court shall direct (8th May, 1835; Ord. 72).

(*a*) As to the time allowed for answering, see Ord. XXXVII. 4, *post*. An attachment issued pending a discussion before the chief clerk as to granting further time to answer, was discharged as irregular, *Davis* v. *Tollemache*, 2 Jur. N. S. 564.

Time allowed for answering.

If a defendant makes default in answering, the plaintiff's usual course now is to proceed under Ord. XXII. (*infra*), to have the bill taken *pro confesso* in the absence of an answer. But he may still, if he chooses, proceed to enforce an answer by attachment; and a plaintiff, though in custody for contempt, may enforce an answer. See note to Ord. XLII. 1, *post*.

In default of answer plaintiff *may* still resort to the old process by writ of attachment.

As to the form of the writ of attachment and attachment generally, see note (*e*), to Ord. XXIX. 3, *post*.

(I.) If the defendant is taken under the writ of attachment, the next proceeding is to bring him before the Court, and the time for doing this is limited by rules 2 & 3 of this Order.

(I.) If defendant is *taken under the writ*, plaintiff may bring him before Court.

The defendant being thus brought to the bar of the court, the further process is regulated by 1 Wm. 4, c. 36, as altered in some points by the general orders.

Thus the plaintiff may under that statute enter an appearance for a defendant in custody. See note (*w*), p. 426, *ante*.

1 W. 4, c. 36, s. 15.

ORDER XII. Process for Want of Answer.

If the defendant can prove that he is unable to answer by reason of his poverty, the Court may assign him a solicitor and counsel to enable him to put in his answer, by rule 4, *infra* (superseding 1 Wm. 4, c. 36, s. 15, clause 6).

If defendant pleads poverty the Court may assign counsel and solicitor.

If the defendant is lunatic or imbecile, a guardian may be assigned him by clause 9 of the same section.

Clause 10 of the same section provides that the Court may, upon motion or petition, after notice to the defendant, allow the plaintiff to amend his bill without thereby discharging the contempt, see p. 411, *ante*.

Clause 11 of the same section provides, that if the defendant still neglects to answer, the plaintiff may obtain leave to put in an answer for him; but see, now, Ord. XIII. 1 (p. 438), *post*, as to a traversing note.

If defendant still refuses plaintiff may put in an answer for him.

If the plaintiff considers it of more importance to obtain an answer from the defendant than to put one in for him, he may proceed further to enforce an answer by clause 12 of the same section, which provides:—

Or defendant may be ordered to remain in custody till answer.

"That, in any case where, upon the application of the plaintiff, the Court shall be satisfied that justice cannot be done to the plaintiff without an answer to the bill or to the interrogatories from the defendant himself, it shall be lawful for the Court to order the defendant to remain in custody until answer or further order, but without prejudice to the plaintiff's availing himself of any of the provisions of this Act." Notice of motion for an order under this rule must be served on the defendant (*Aveling* v. *Martin*, 17 Jur. 271; but see *Maitland* v. *Rodger*, 14 Sim. 92). A plaintiff who has obtained the order is not bound to take the bill *pro confesso* under the next rule (*Maitland* v. *Rodger*, l. c.; and see *Potts* v. *Whitmore*, 8 Beav. 317).

If the plaintiff is still unsuccessful in enforcing an answer, he may proceed to take the bill *pro confesso* against the defendant in prison, by clause 13 of the same section, which provides:—

And if defendant still refuses, the bill may be taken pro confesso.

"That where the defendant is in contempt for not answering, and in actual custody under process for such contempt, or, being already in custody, shall be detained by an attachment for such contempt, and shall not put in an answer within two calendar months after he is lodged in gaol or prison, or the attachment is lodged against him, he being already in prison, the plaintiff shall, at the expiration of such two calendar months, proceed to take the bill *pro confesso*, and shall accordingly obtain an order for taking the same *pro confesso* within six weeks after the period computed from the expiration of such two calendar months" (see *Simmons* v. *Wood*, 2 Hare, 644, where it was held that the time ran during vacation) "within which he may be able to take the same *pro confesso;* or in default of so doing the defendant shall, upon application to the Court, be entitled to be discharged out of custody without paying any of the costs of the contempt, unless the Court shall, under the power hereinbefore contained, see good cause to remand and detain the defendant in custody."

Process of taking bill pro confesso against defendant in prison.

The mode of proceeding to take a bill *pro confesso* against a defendant in prison is either by bringing him up by *habeas corpus* by *rules* 2 *or* 4 of the same section, or by the more expeditious process of a motion under Ord. XXII. 1, *post*, p. 474.

After the time prescribed, the bill cannot be taken *pro confesso* under this clause; *Collins* v. *Collyer*, Cr. & Ph. 262; and see *Lewis* v. *Evans*, Cr. & Ph. 264, where the defendant was discharged from custody without payment of costs. But the delay may be explained (*Bates* v. *Frost*, 9 Jur. 291).

Discharge of defendant from custody.

As to when a defendant will and will not be entitled to his discharge under this clause, see *Williams* v. *Newton*, 11 Sm. 45; *Woodward* v. *Conebear*, 2 Hare, 506. When a defendant is once entitled to his discharge he cannot waive it (*Haynes* v. *Ball*, 4 Beav. 101; *Greening* v. *Greening*, 1 Beav. 121). As to notice of application for discharge, see rule 5, *infra;* and as to taking up the process after a discharge, see rule 7, *infra*.

(II.) If defendant *cannot be taken*, plaintiff may obtain writ of sequestration on mesne process.

(II.) But if the defendant cannot be taken under the writ of attachment, either by the sheriff or the serjeant-at-arms, then the plaintiff may obtain a writ of sequestration on *mesne process* (see rule 6 of the order in the text), and afterwards take the bill *pro confesso*, or he may proceed without sequestration to take the bill *pro confesso* under Ord. XXII. 2, (p. 475, *post*); and see Daniell, 452; and note (*e*), p. 514, *post*, as to sequestration generally.

(*b*) In general when a bill is filed against a husband and wife, the husband appears for both, and the plaintiff is entitled to a joint answer from both, and if the wife makes default, the husband alone is liable to process of contempt, see *Gee* v. *Cottle*, 3 M. & Cr. 180 ; *Nichols* v. *Ward*, 2 M. & G. 140.

But the husband may be free from his liability, and the wife alone become liable, by an order of Court obtained for the purpose, which may be done (1) with her concurrence, or (2) against her will ;

Attachment of married women when allowed.

(1) If he is incapable, or she dissents from his answer, she may obtain, or concur in obtaining, the order ;

When she thus voluntarily makes herself liable, the plaintiff may, on her default, obtain an *ex parte* order to attach her, *Home* v. *Patrick* (1), 30 Beav. 405 ; in such cases the time for answering runs from the date of the order, *Jackson* v. *Haworth*, 1 S. & S. 161.

(2) If the case is one of those in which a *feme covert* ought to defend as a *feme sole*, the plaintiff may obtain the order without her concurrence, *e.g.*, if the husband is abroad, and she has separate property (*Nichols* v. *Ward*, 2 M. & G. 140 ; *Bull* v. *Withey*, 9 Jur. N. S. 595 ; *Bunyan* v. *Mortimer*, 6 Madd. 278 ; *Richardson* v. *De Held*, 1 N. R. 5 ; *Hole* v. *Dubois*, 2 Ves. 613) ; or if he is insane (*Estcourt* v. *Ewington*, 9 Sim. 252) ; but not merely because he is in prison (*Anon.* 2 Ves. Jur. 332).

A *married woman* need not answer separately and cannot be committed, unless (I.) she dissents from husband's answer and obtains order to answer separately ; or unless (II.) she ought to defend as a feme sole ; or (III.) refuses to join in his answer.

Or if the wife refuse to join in answering, her husband may, on an affidavit of no collusion, obtain an order by motion (on notice to the plaintiff) that process of contempt on that account be stayed against him, *Barry* v. *Cane*, 3 Madd. 472; *Lenaghan* v. *Smith*, 2 Ph. 537 ; *Garey* v. *Whittingham*, 1 S. & S. 163 ; and the plaintiff may apply for an order that she may answer separately, *Bray* v. *Akers*, 15 Sim. 610 ; *Woodward* v. *Conebear*, 8 Jur. 642.

But when the order that she may answer separately is obtained without her concurrence, a subsequent order to attach her cannot be obtained without notice to her, *Graham* v. *Fitch*, 2 De G. & Sm. 246; *Home* v. *Patrick*, 30 Beav. 405.

As to process against the Attorney-General for want of an answer, see *Groom* v. *Attorney-General*, 9 Sim. 325 ; *Barclay* v. *Russell*, 2 Dick. 729. As to infants, lunatics, &c., making default, see Ord. VII. 3, p. 400, *ante*.

Process against Att.-Gen. ; against infants.

2. Where a defendant, being in custody of the sergeant-at-arms or of a messenger under an attachment for want of his answer, is not brought to the bar of the Court (*c*) within ten days after he was taken into custody, he shall be discharged out of custody by the serjeant-at-arms or messenger in whose custody he is, without payment by him of the costs of his contempt (*d*), which in such case shall be paid by the plaintiff. But where such defendant does not put in his answer within eight days after such discharge, the plaintiff may cause a new attachment to be issued against him for want of his answer (8th May, 1845; Ord. 73) (*e*).

Rule 2. Defendant in custody of serjeant-at-arms, not brought to bar of Court in ten days, to be discharged. New attachment may issue.

(*c*) A defendant may be brought to the judge's residence in vacation (*Clark* v. *Clark*, 4 Beav. 497 ; *Simmons* v. *Wood*, 2 Hare, 644).

(*d*) See as to costs incurred in issuing process of contempt, *Attorney-General* v. *Carrington*, 6 Beav. 460.

(*e*) See *Woodward* v. *Conebear*, 1 Hare, 297, and rule 7, *infra*, as to taking up the process after a discharge.

3. Where a defendant is in prison under an attachment

Rule 3.

ORDER XII. Process for Want of Answer.

for not answering, or, being already in prison, is detained under such an attachment, and is not brought to the bar of the Court within thirty days (*f*) from the time of his being actually in custody or detained (being already in custody) under such attachment he shall be discharged (*g*) from the process for want of answer under which he was arrested or detained by the sheriff, gaoler, or keeper of the gaol in whose custody he is, without payment of the costs of his contempt, which in such case shall be paid by the plaintiff. But if such defendant does not put in his answer within eight days after such discharge, the plaintiff may cause a new attachment to be issued against him for want of his answer (8th May, 1845; Ord. 74).

Defendant in prison, not brought to bar of Court in thirty days, discharged.

New attachment may issue.

(*f*) See now 23 & 24 Vict. c. 149, p. 306, *ante*, which directs the Queen's prison to be visited quarterly, and *Leyton* v. *Mortimore*, 2 D. F. J. 353.

The thirty days run during vacation (*Fortescue* v. *Hallett*, 5 W. R. 747).

(*g*) Negligence or acquiescence on the part of the defendant entitled to his discharge under this or the preceding rule will not waive his rights under them (*Greening* v. *Greening*, 1 Beav. 121; *Haynes* v. *Ball*, 4 Beav. 101, decided under the 1 Wm. 4, c. 36, but within the principle of the rule).

Negligence on part of defendant no waiver.

Rule 4. Pauper defendant in custody for want of his answer, may have solicitor and counsel assigned.

4. (*h*) Where a defendant is brought up in custody for want of his answer, and makes oath in court that he is unable by reason of poverty to employ a solicitor to put in his answer, the Court, if not satisfied of the truth of that allegation, may direct an inquiry as to the truth thereof (*i*), and may appoint a solicitor to conduct such inquiry on the behalf of such defendant; and if it is ascertained by means of such inquiry, or if the Court is satisfied without such inquiry, that such defendant is unable by reason of poverty to employ a solicitor to put in his answer, the Court may assign a solicitor and counsel for such defendant to enable him to put in his answer (8th May, 1845; Ord. 75) (*i*).

(*h*) This rule is almost identical with 23 & 24 Vict. c. 149, s. 4, p. 307, *ante*. And see as to pauper defendants generally, Ord. VII. 8, *ante*, p. 403; but even an *executor* may defend or sue *in formâ pauperis* under this rule, *Bayley* v. *Bayley*, 11 Beav. 256.

Defendant failing to show poverty.

(*i*) When the defendant fails to show poverty, proper steps will be taken to have the bill taken *pro confesso* (*Bull* v. *Falkner*, 11 Jur. 235); for the process of inquiry under the rule, see Daniell, 459.

Rule 5. Pauper prisoners in

5. Where application is intended to be made for the discharge of any prisoner in contempt, and for the pay-

ment out of the Suitors' Fund of the costs of such contempt, in pursuance of the provisions for that purpose contained in the Stat. 1 Wm. 4, c. 36 (*k*), notice in writing of such intended application shall be served upon the solicitor to the Suitors' Fund, two clear days at least before the day upon which the application is intended to be made. And where an order is made under the said Act, or under the 4th Rule of this Order, directing an inquiry as to the fact of the poverty of any prisoner in contempt, notice in writing of such order and of every summons to proceed thereupon, shall be duly served upon the solicitor to the Suitors' Fund (6th Dec. 1844).

contempt how discharged.

(*k*) See p. 434, *ante;* and for form of order for discharge, see Seton, 1237.

6. Upon the sheriff's return *non est inventus* to an attachment issued against any defendant for not answering the bill, and upon affidavit made that due diligence was used to ascertain whether such defendant was at the time of issuing such writ, and in endeavouring to apprehend such defendant under the same, and that the person suing forth such writ verily believed at the time of suing forth the same, that such defendant was in the county (*l*) into which such writ was issued, the plaintiff shall be entitled to a writ of sequestration (26th Aug. 1841; Ord. 9) (*m*).

Rule 6. On return non est inventus to attachment for want of answer sequestration may issue.

(*l*) As to sequestration on mesne process, see p. 434, *ad finem.*

To obtain a writ of sequestration under this rule, the person issuing out the attachment must swear that he verily believes the defendant was "*in the county, &c.*" It is not enough to say that he verily believes him to be *resident in the county* (*Storer* v. *Great Western Railway Company*, 1 Y. & Coll. C. C. 180; *Handfield* v. *Wildes*, 2 R. & M. 91, *post;* and see further, *Wright* v. *Green*, 2 R. & M. 93; *Davis* v. *Hammond*, 5 Sim. 9; *Nelthorpe* v. *Wright*, 2 Keen, 253).

Affidavit on applying for sequestration on mesne process.

(*m*) See further, as to writs of sequestration, *Goldsmith* v. *Goldsmith*, 10 Jur. 561, and note (*e*), p. 514, *post.* The order of sequestration is not in itself an order of contempt, but the consequence of such an order; hence it is not discharged by the discharge of a debtor under the insolvent Acts (*Taylor* v. *Parker*, 17 Jur. 929; see, too, *Taylor* v. *Salmon*, 3 M. & Cr. 109, cited next note).

Sequestration generally.

7. Where a defendant, in contempt for want of answer, obtains, upon filing his answer, the common order to be discharged as to his contempt, on payment or tender of the costs thereof, or the plaintiff accepts the costs with-

Rule 7. Former process of contempt, in case answer is insufficient,

ORDER XII. Process for Want of Answer.

out order, the plaintiff shall not be compelled, in case the answer is insufficient, to recommence the process of contempt against the defendant, but shall be at liberty to take up the process at the point to which he had before proceeded (*n*) (23rd Nov. 1831; Ord. 24. 3rd April, 1828; Ord. 24).

may be taken up again.

Resuming process of contempt.

(*n*) See Daniell, 467; *Gray* v. *Campbell*, 1 R. & M. 323, and other cases there cited, and see *Taylor* v. *Salmon*, 3 M. & Cr. 109, where it was held that when a defendant in contempt, having filed his answer, had got the common order to clear his contempt, and his answer was subsequently excepted to successfully for insufficiency, the plaintiff was entitled to take up the process of contempt at the stage at which it was stopped by the order, and consequently that a sequestration for want of answer to exceptions, sued out immediately on the defendant's submitting to answer them, and a consequent order to take the bill *pro confesso* (see p. 434, *ad finem*), were regular.

ORDER XIII. Traversing Note.

ORDER XIII.

TRAVERSING NOTE (*a*).

Rule 1. To original or supplemental bill, or bill amended before answer.

1. After the expiration of the time allowed to a defendant (*b*) to plead, answer, or demur (not demurring alone) to any original or supplemental bill or bill amended before answer, which he has been required to answer, if such defendant has not filed (*c*) any plea, answer, or demurrer, the plaintiff may file a note at the Record and Writ Clerks' Office to the following effect:—"The plaintiff intends to proceed with his cause as if the defendant had filed an answer, traversing the case made by the bill." (8th May, 1845; Ord. 52).

Traversing note under new practice, *not* allowed against infant defendants; *nor* unless defendant has *appeared*;

(*a*) Where under the new practice, notice of motion for decree is given, a traversing note is unnecessary except where a defendant is required to answer and does not do so (*Heath* v. *Lewis*, 17 Jur. 1090).

(*b*) The rule does not apply, it seems, to an infant defendant (*Emery* v. *Newson*, 10 Sim. 564).

See further, as to the filing of a traversing note, *Hughes* v. *Lipscombe*, 3 Hare, 341. It is a general rule that before a traversing note can be filed, the defendant must have appeared, or had an appearance entered for him, see *Treweck* v. *Turner*, 1 Y. & C. C. C. 112; *Moss* v. *Buckley*, 2 Ph. 628; *Laurie* v. *Burn*, 6 Hare, 308; *Hoslock* v. *Wilson*, 12 Beav. 545. For the proper course in such a case, see Ord. X. 4, and notes, p. 421, *ante*.

As to service of the order on the defendant, see note to sect. 5, *infra*.

nor after notice of answer.

(*c*) A traversing note filed after notice has been given of the filing of an answer will be ordered to be taken off the file (*Rigby* v. *Rigby*, 6 Beav. 265).

Rule 2. To bill amended after answer.

2. After the expiration of the time allowed to a defendant to plead, answer, or demur (not demurring alone), to

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a bill amended after answer, which he has been required to answer, if such defendant has not filed any plea, answer, or demurrer, the plaintiff may file a note at the Record and Writ Clerks' Office to the following effect:—"The plaintiff intends to proceed with his cause as if the defendant had filed an answer traversing the allegations introduced into the bill by amendment" (8th May, 1845; Ord. 53).

Rule 3. Where no further answer put in.

3. After the expiration of the time allowed to a defendant to put in his further answer to any bill, if such defendant shall not have put in any further answer, the plaintiff may file a note at the Record and Writ Clerks' Office to the following effect:—"The plaintiff intends to proceed with his cause as if the defendant had filed a further answer traversing the allegations in the bill whereon the exceptions are founded" (8th May, 1845; Ord. 54).

Rule 4. Where demurrer or plea to whole bill overruled.

4. Where a demurrer or plea to the whole bill is overruled, the plaintiff, if he does not require an answer, may immediately file his note in manner directed by the 1st and 2nd Rules of this Order, as the case may require, and with the same effect, unless the Court, upon overruling such demurrer or plea, gives time to the defendant to plead, answer, or demur; and in such case, if the defendant does not file any plea, answer, or demurrer within the time so allowed by the Court, the plaintiff, if he does not then require an answer, may, on the expiration of such time, file such note (8th May, 1845; Ord. 55).

Rule 5. Copy of traversing note how served.

5. A traversing note having been filed a copy thereof shall be served (*d*) on the defendant against whom the same was filed, in the manner directed by the 4th and 6th Rules of Order III., for the service of documents not requiring personal service (8th May, 1845; Ord. 56).

(*d*) The Court has refused to order service of a traversing note on a defendant abroad; but see note (*q*), p. 425, *ante*; but substituted service of a traversing note may be allowed, note (*c*), p. 420, *ante*.

Rule 6. Effect of filing and service.

6. The filing of a traversing note and the due service of a copy thereof shall have the same effect as if the defendant against whom such note is filed had filed a full

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answer or further answer traversing the whole bill (*e*), or those parts of the bill to which the note relates, on the day on which the note was filed (8th May, 1845; Ord. 57).

Effect of traversing note.

(*e*) This rule does not make a traversing note equal to an answer *for the purpose of evidence* (*Martin* v. *Norman*, 2 Hare, 596). Although the defendant does not appear at the hearing, the plaintiff must nevertheless go through his case, and take such a decree as the Court thinks just (*Evans* v. *Williams*, 6 Beav. 118).

Rule 7. Defendant cannot plead, &c., after service of traversing note without leave.

7. A defendant, after the service of the copy of a traversing note filed against him as aforesaid, shall not plead, answer, or demur to the bill, or put in any further answer thereto, without the special leave of the Court (*f*), and the cause shall stand in the same situation as if such defendant had filed a full answer or further answer to the bill on the day on which the note was filed (8th May, 1845; Ord. 58).

How leave obtained.

(*f*) The proper course in such a case is to move to take the traversing note off the file, and for liberty to file an answer, &c. (*Towne* v. *Bonnin*, 1 De G. & Sm. 128). The defendant will of course have to pay the costs of the application (*ibid.*). As to an application by the plaintiff to take a traversing note off the file, see *Simmons* v. *Wood*, 5 Beav. 390, and *Maniere* v. *Leicester*, Kay, App. xlviii.; 5 D. M. G. 75.

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ORDER XIV.

Demurrers (*a*) and Pleas (*b*).

Rule 1. Demurrer ore tenus.

1. Where any grounds of demurrer are urged on arguing a demurrer, beyond the grounds therein expressed, and those grounds which are so expressed are disallowed, the defendant shall pay the same costs (*c*) as if the demurrer were overruled, although the grounds of demurrer so newly urged may be allowed (22nd May, 1661; Sanders, 298).

Filing and setting down pleas and demurrers.

(*a*) A defendant cannot put in distinct defences *to the whole bill* by plea, demurrer, and answer, or any two of them; see note (*m*), p. 447, *post*.

The time for demurring is fixed by Ord. XXXVII. 3.

As to giving *notice of filing* pleas or demurrers, see Ord. III. 9, p. 389, *ante*; and as to *setting them down for hearing*, see note (*n*), p. 447, *post*.

No demurrer after attach-

A defendant who has been attached for not answering, cannot file a demurrer (*Mellor* v. *Hall*, 2 S. & S. 321), or a demurrer and answer (*Curzon* v. *De la*

Zouch, 1 Sm. 185), even though the demurrer be only to part of the discovery and not to the relief (*Vigers* v. *Lord Audley*, 2 M. & Cr. 49); nor will the taking of an office copy of the demurrer and answer be a waiver of the irregularity (*Attorney-General* v. *Shield*, 11 Beav. 441).

ment for want of answer.

"A demurrer will lie wherever it is clear that, taking the charges in the bill to be true, the bill would be dismissed at the hearing; but it must be founded on this, that it is an absolute, certain, and clear proposition that it would be so; for if it is a case of circumstances, in which a minute variation between them as stated by the bill, and those established by the evidence, may either incline the Court to modify the relief or to grant no relief at all, the Court, although it sees that the granting the modified relief will be attended with considerable difficulty, will not support a demurrer."—Daniell, p. 500; see *Brownsword* v. *Edwards*, 2 Ves. Sen. 242; *Mortimer* v. *Hartley*, 3 De G. & Sm. 316; *Bowser* v. *Maclean*, 9 W. R. 113; *Kirwan* v. *Daniell*, 5 Hare, 493, as to doubtful legal questions not being decided on demurrer.

Where demurrer will lie.

The rule that all matters of fact appearing on the bill are admitted for the purposes of the demurrer has been carried so far, that the Court has refused to allow the inaccurate statement of a deed in the bill to be corrected by a reference to the deed itself (*Cuddon* v. *Tite*, 1 Gif. 395; and see *Campbell* v. *Mackay*, 1 M. & Cr. 603; and the other cases cited in Daniell, 501—2); but repugnant or ambiguous statements in a bill may on demurrer be construed adversely to the pleader (*Vernon* v. *Vernon*, 2 M. & Cr. 145); see Daniell, 502.

Statements in bill how far admitted for purposes of demurrer.

Ambiguous statements taken against plaintiff.

As to the different kinds of demurrers, see Daniell, 503; Mitf. on Plead. pp. 126—156. Where the plaintiff prays for discovery, as incident to relief to which he is not entitled, a demurrer will lie (*Evans* v. *Portreeve of Avon*, 6 Jur. N. S. 1361); and as to what *averments* will prevent a demurrer from lying to the bill, see *Plumbe* v. *Plumbe*, 4 Y. & Coll. Exch. Ca. 350; *Bowser* v. *Maclean*, 9 W. R. 112, l. c.; *Jackson* v. *North Wales Railway Company*, 13 Jur. 69; *Wormald* v. *De Lisle*, 3 Beav. 18; *Sibson* v. *Edgeworth*, 2 De G. & Sm. 73; *Smith* v. *Kay*, 30 L. J. Ch. 45, H. L.; *Bothomly* v. *Squire*, 3 Drew. p. 517; *Dent* v. *Turpin*, 2 J. & H. 139; *Gilbert* v. *Lewis*, 1 J. & H. 452; *Ernest* v. *Partridge*, 1 N. R. 425. The insertion of such *averments*, if untrue, may be a reason for giving costs against the plaintiff, *Lind* v. *Isle of Wight Ferry Company*, 1 N. R. 13.

Different kinds of demurrers.

Averments preventing demurrer.

For form of demurrer see Daniell III., 513, 536; *Osborne* v. *Jullion*, 3 Drew. 552; *Barnes* v. *Taylor*, 4 W. R. 577.

Form of demurrer.

A demurrer cannot be good in part and bad in part; in other words, the judgment cannot be divided upon demurrer, *Mayor of London* v. *Levy*, 8 Ves. 403; Daniell, 535.

Cannot be good in part.

It must express clearly the grounds on which the defendant relies, *e.g.* if for want of parties it must state who the necessary parties are (*Attorney-General* v. *Jackson*, 11 Ves. 369); though it may not be necessary to name them (*ibid.*); if for multifariousness it must state that the bill unites distinct matters (*Rayner* v. *Julian*, 2 Dick. 677, cited in note to *Salvidge* v. *Hyde*, 5 Madd. 144); and where a defendant demurs on two distinct grounds, *e.g.* for want of equity and want of jurisdiction, he should state them both as separate and distinct causes of demurrer (*Barber* v. *Barber*, 4 Drew. 666). But *semble*, there should in such a case be only one order on the demurrers (*Wellesley* v. *Wellesley*, 4 M. & Cr. 554, 556).

Must be clear.

Demurrer on two distinct grounds.

As to putting in a partial demurrer accompanied by an answer, see notes to Rules 8 & 9, p. 446, *infra*; and for the meaning of the rule that a *defendant who answers at all must answer fully*," see note (*a*) to Ord. XV. p. 450, *infra*.

Partial demurrer with answer is allowed.

As to an answer overruling a demurrer, see note to rule 9, *infra*.

"A demurrer can be to nothing but what appears on the face of the bill, otherwise it would be a speaking demurrer" (per Lord Hardwicke in *Brownsword* v. *Edwards*, 2 Ves. Sen. 244; but see *Wood* v. *Midgeley*, 5 D. M. G. 41; *Edsall* v. *Buchanan*, 4 Bro. C. C. 254; *Davies* v. *Williams*, 1 Sim. 5).

"Speaking demurrer."

Where the defendant in addition to the demurrer on the record demurs *ore*

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tenus, see rule in the text, such causes of demurrer must be co-extensive with the demurrer on the record (Daniell, 539). A defendant demurring on the record for multifariousness only may demur *ore tenus* for want of equity (*Rump* v. *Greenhill*, 20 Beav. 572; *Henderson* v. *Cook*, 4 Drew. 306). So

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a demurrer on the record for want of equity will enable a defendant to demur *ore tenus* for want of jurisdiction (*Barber* v. *Barber*, 4 Drew. 666), or for want of parties (*Cooper* v. *Earl Powis*, 3 De G. & Sm. 688). As to the costs of a demurrer *ore tenus* see note (*c*), p. 444.

Hearing of demurrer; Defendant making default.

Where a defendant makes default at the hearing of a demurrer the Court will not overrule the demurrer, but hear the plaintiff (*Pensfold* v. *Ramsbottom*, 1 Swanst. 552; and see, as to restoring a demurrer struck out, *Tolson* v. *Lord Fitzwilliam*, 4 Madd. 403).

Bill demurrable but not demurred to.

Where a bill is dismissed at the hearing on a ground which might have been raised by demurrer, the bill will be dismissed *without costs*, *Hollingsworth* v. *Shekerhoft*, 14 Beav. 492; *Webb* v. *England*, 29 Beav. 44; following *Jones* v. *Davids*, 4 Russ. 277, 278; *Hill* v. *Reardon*, 2 Sim. & St. 439; but see *Brace* v. *Taylor*, 2 Atk. 253; and a defendant is not justified in omitting to demur to a bill because it contains charges of fraud against him which he is desirous of answering, *Nesbitt* v. *Berridge*, 9 Jur. N. S. 1044.

Amending demurrer.

A clerical error in a demurrer may be amended on motion *ex parte* (*Richardson* v. *Hastings*, 7 Beav. 58), or at the hearing (*Osborne* v. *Jullion*, 3 Drew. 555). In *Devonsher* v. *Newenham*, 2 Sch. & L. 199, the Court overruled a demurrer which though good in substance was bad in form, with liberty to defendant to demur again on payment of costs. See further, as to amending demurrers, *Baker* v. *Mellish*, 11 Ves. 68; *Thorpe* v. *Macarty*, 5 Madd. 318.

When Court gives liberty to amend bill after demurrer is allowed.

The Court will not generally give leave to amend after a general demurrer has been allowed (*Nowell* v. *Andover Railway Company*, 7 Jur. 839); but it is in the discretion of the Court to do so (per Lord Cottenham in *Wellesley* v. *Wellesley*, 4 M. & Cr. 558; *Tyler* v. *Bell*, 1 Keen, 826; s. c. 2 M. & Cr. 89; *Sibson* v. *Edgeworth*, 2 De G. & S. 73; *Osborne* v. *Jullion*, 3 Drew. 596; *Tryon* v. *Westminster Improvement Commissioners*, 4 L. T. N. S. 203; *Rawlings* v. *Lambert*, 1 J. & H. 458; *Schneider* v. *Lizardi*, 9 Beav. 416, where it was said that the question was one to be determined "upon the facts appearing before the Court, upon the allegations in the bill, the limited admissions on the demurrer, and the nature and probability of the case." See *Holmes* v. *Waring*, 8 Price, 604, where leave was given).

Effect of demurrer allowed on injunction.

A demurrer *allowed* puts an end to a pending injunction, even though liberty to amend be given (*Schneider* v. *Lizardi*, 9 Beav. 416), but a demurrer may be allowed without prejudice to a new bill (*Oriental Navigation Company* v. *Briggs*, 10 W. R. 125).

Effect of demurrer overruled.

After demurrer *overruled* a defendant cannot demur again (*Bancroft* v. *Wardour*, 2 Bro. C. C. 66), unless the bill be amended (*Bosanquet* v. *Marsham*, 4 Sim. 573; see note (*m*), p. 447, *post*), nor plead without leave of the Court (*Rowley* v. *Eccles*, 1 S. & S. 511).

Appeals from orders on demurrers.

Where a demurrer has been overruled the defendant may appeal from the decision overruling the demurrer, although the bill be in the meantime amended (*Jackson* v. *North Wales Railway Company*, 13 Jur. 70, note; but see *Wellesley* v. *Wellesley*, 4 M. & Cr. 554); nor does the plaintiff, by undertaking to amend after demurrer allowed, preclude himself from appealing against the decision allowing the demurrer (*Lidbetter* v. *Long*, 4 M. & Cr. 285). A defendant may sometimes obtain an order to defer answering until such appeal is heard, see note (*d*), pp. 521, 522, *post*.

As to the costs of a demurrer, see *post*, rules 12—17.

(*b*) The time for pleading is fixed by Ord. XXXVII. 4. A plea may be put in after attachment for want of answer, *Mellor* v. *Hall*, 2 S. & S. 321.

Definition of a plea.

A plea has been defined to be "a special answer, showing or relying upon one or more things as a cause why the suit should be either dismissed, delayed or barred" (Mitf. Pl., 5th ed. p. 258). It is either *affirmative*, stating matter not apparent on the bill, as a bar to relief, or *negative*, denying the truth of some matter apparent on the bill on which the plaintiff's title to relief depends, see Daniell, 555.

As to the different kinds of pleas, see Mitf. Pl., pp. 258—341; Daniell, 578, *et seqq.*

As to the form of a plea, see Daniell, III., 629.

Different kinds of pleas.

A plea may be of several matters, provided they raise one issue (*Saunders* v. *Druce*, 3 Drew. 140, 156, and cases there cited). But as the only object of a plea instead of an answer is to save expense by taking up the matter shortly on a single point, every plea must be confined to one issue, and a double plea, without leave, is bad, *i.e.*, where either fact taken alone would be a complete bar to the suit (*Campbell* v. *Beaufoy*, Johns, 320); but a double plea may be filed by special leave of the Court, obtained on motion (see *Gibson* v. *Whitehead*, 4 Madd. 241; *Bampton* v. *Birchall*, 4 Beav. 558, where the defendant was allowed to plead the plea of "not heir" and the Statute of Limitations; *Kay* v. *Marshall*, 1 Keen, 190, where he was allowed to plead to a bill to restrain the infringement of a patent, that the invention, so far as it was new, was not useful, and, so far as it was useful, was not new; comp. the observations of Sir John Romilly in *Young* v. *White*, 17 Beav. 532, 540). The question whether a double plea will be allowed depends very much upon questions of convenience or inconvenience (see 1 Keen, 197; and see *Fox* v. *Yates*, 24 Beav. 271).

Double pleas. May be filed by special leave.

Plea to amended bill.

A second plea for want of parties is valid, where the objection is first introduced by an intermediate amendment of the bill (*Henley* v. *Stone*, 4 Beav. 389).

Plea of coverture.

A married woman cannot plead her coverture without joining her husband except by special order (*Higginson* v. *Wilson*, 11 Jur. 1071).

Whether plea may be good in part.

It used to be said that (unlike a demurrer) a plea might be good in part or bad in part, *i.e.*, that the Court would allow it to so much of the bill as it properly applied to, see *Harrison* v. *Southcote*, 2 Ves. Sen. 389; but in modern cases this practice does not seem to be followed, and a plea covering too much is bad altogether, *Salmon* v. *Dean*, 3 M. & G. 348; *Hewitt* v. *Hewitt*, 11 W. R. 849; and the 9th rule of this Order, *post*, p. 447, is no relaxation of this principle, see Daniell, 568, note (*g*).

Averments in plea.

A plea must contain averments (see Daniell, 562—4), of the facts on which the defendant means to rely, so that the plaintiff may know what case he has to meet. Thus an affirmative plea, *e.g.*, a plea of a decree in another suit for the same matter, should aver that the allegations as to the title for relief were the same in both suits, *Lady Londonderry* v. *Baker*, 3 Giff. 128, on appeal; but see *Herez* v. *Riera*, 11 Sim. 318.

When a *partial* answer should accompany plea to meet plaintiff's evidence in opposition to plea,

An answer in support of or accompanying an *affirmative* plea is necessary where there are allegations in the bill inconsistent with the plea, and interrogatories have been filed as to such allegations, *Hunt* v. *Penrice*, 17 Beav. 525; (see Daniell, 566 *et seqq.*); thus in pleading a stated account, if specific errors in the account or fund are charged in the bill, the errors and fraud must be denied by averments in the plea, and also by an answer in support, if the defendant is interrogated as to them, *Phelps* v. *Sproule*, 1 M. & K. 231, 236; see *Hardman* v. *Ellames*, 2 M. & K. 732.

or to give discovery in answer to plaintiff's interrogatories.

An answer in support of a *negative* plea, must generally be confined to facts specially charged as evidence of the plaintiff's title, *Thring* v. *Edgar*, 2 S. & S. 274; and if a plaintiff requires an answer as to documents alleged to be in support of his title, the defendant must answer as to such documents, see *Mansell* v. *Feeney*, 2 J. & H. 313; Daniell, 574; see *ante*, p. 176.

An answer in support of a plea is no part of the defence, but is the evidence which the plaintiff is entitled to call for, and must be full and clear, or the Court will intend against the pleader, Daniell, 575; but as to cases where a defendant may aver to the best of his knowledge and belief, see *Kirkman* v. *Andrews*, 4 Beav. 554; *Drew* v. *Drew*, 2 V. & B. 160.

Defendant may not plead after demurrer or plea overruled.

After a demurrer overruled, a defendant cannot plead without the leave of the Court (*Rowley* v. *Eccles*, cited last page); and a defendant to a bill of revivor cannot put in a plea which has been put in to the original suit and overruled (*Samuda* v. *Furtado*, 3 Bro. C. C. 69), and as to pleading to an amended bill after answering an original bill, see note to rule 9.

Answer overruling plea.

If a defendant answers a bill, and also pleads to it, the answer overrules the plea, see note to rule 9, *infra*.

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As to the costs of a plea, see *post*, rules 12—17.

Where in a simple case the defendant neglected to raise the defence by plea, the bill was dismissed *without costs* (*Sanders* v. *Benson*, 4 Beav. 350).

As to what pleas must be on oath, see rule 2.

Costs of plea, and of answer where plea should have been put in.

Costs of demurrer ore tenus.

(*c*) Lord Eldon said, in *Attorney-General* v. *Brown*, 1 Sw. 288, followed in *Cooper* v. *Earl Powis*, 3 De G. & Sm. 689; and *Mortimer* v. *Fraser*, 2 M. & Cr. 173, that a defendant availing himself of the right to demur *ore tenus*, must pay the costs of the demurrer on the record. But in another case, the Court refused to give the plaintiff the costs of the demurrer on the record (*Brown* v. *Downes*, 11 Sim. 283), and see *Newton* v. *Earl of Egmont*, 4 Sim. 574; but now the general rule is that the defendant in such a case pays the costs of the demurrer on the record, and no order is made as to the costs of the demurrer *ore tenus*, see *Macyntire* v. *Connell*, 1 Sim. N. S. 257, as cited in Morgan & Davey on Costs.

Rule 2. Pleas upon oath, where matter not of record.

2. A plea may be put in without oath, where the matter of the plea appears upon record (*d*), but where the matter of the plea does not appear upon record, the plea must be upon oath (29th Jan. 1618-19; Ord. 58) (*e*).

What pleas need not be on oath.

(*d*) A plea of outlawry need not be on oath (Mitf. on Pleading, 265, and cases there cited). Nor a plea of conviction for felony (*Anon.* v. *Davis*, 19 Ves. 81); nor a plea of the pending of another suit for the same matter (*Urlin* v. *Anon.*, 1 Vern. 332); but a plea of privilege (*Gibson* v. *Whiteacre*, 2 Vern. 83), or of bankruptcy (*Joseph* v. *Tuckey*, 2 Cox, 44, and see *Kirkman* v. *Andrews*, 4 Beav. 554), must be on oath. And generally where the plea goes to *facts, bringing the case within a matter of record*, the plea must be on oath (*Wall* v. *Stubbs*, 2 V. & B. 354).

A plea of illegitimacy to a bill filed by a person claiming under a bequest to the children of A. as a class must be put in on oath (*Wild* v. *Gladstone*, 3 De G. & Sm. 740. See Mitf. on Pleading, p. 352).

(*e*) A plea required to be sworn but not sworn to will be ordered to be taken off the file, and the irregularity is not waived by the plaintiff's setting it down for argument (*Wall* v. *Stubbs*, 2 V. & B. 354).

In case of several defendants.

However, where a joint and several plea had been sworn to by all the defendants except one, the Court refused to take it off the file on that ground (*Attorney-General* v. *Cradock*, 8 Sim. 466; *Cope* v. *Parry*, 1 Madd. 83; but see *Cooke* v. *Westall*, 1 Madd. 265).

Rule 3. Signature to pleas.

3. All pleas put in upon oath shall be signed by the parties swearing the same, and such signature shall be affixed or acknowledged by them in the presence of the persons before whom such oath shall be taken (27th April, 1748).

Rule 4. Plea of outlawry.

4. No plea of outlawry (*f*) shall be allowed without pleading the record *sub pede sigilli* (29th Jan. 1618-19; Ord. 59) (*g*).

Plea of outlawry.

(*f*) As to the plea of outlawry, see *Fox* v. *Yates*, 24 Beav. 271; and see *post*, note to r. 18; and Mitf. on Plead. 265. A plea of outlawry may be filed by a party in contempt (*Waters* v. *Chambers*, 1 S. & S. 225).

Annexing office copy of outlawry to plea.

(*g*) The office copy of the record of outlawry is generally annexed to the plea (Mitf. on Pleading, p. 265, note). In *Waters* v. *Mayhew*, 1 S. & S. 220, the plea was allowed to be amended by annexing this copy.

The result of this rule is, that no plea of outlawry is good unless it appears that a judgment of outlawry has been pronounced (*Winthrop* v. *Elderton*, 15 Jur. 1028). The outlawry of a relator and of the next friend of an infant is a good plea. *Secus*, as to plaintiff executor (*Killigrew* v. *Killigrew*, 1 Vern. 184).

Plea of outlawry when good.

Rule 5. When sufficient.

5. A plea of outlawry of the plaintiff, if it took place in an action as to the matter concerning which relief is sought by the bill is insufficient. In other cases a plea of outlawry is a good plea, so long as the outlawry remains in force (*h*). But where the outlawry is reversed the defendant, after receiving his costs (*i*), in respect of the plea, shall answer the bill as if such outlawry had not existed. Where the plaintiff conceives such plea of outlawry, through mispleading or otherwise, to be insufficient, he may set it down for argument (22nd May, 1661; Sanders, 298).

When to be set down for argument.

(*h*) When the plaintiff has been outlawed since the answer was put in, the Court will not entertain an interlocutory application by him, though the outlawry was not complete when notice of the application was given (*Knowles* v. *Rhydyfeded Colliery Company*, Johns. 514).

Effect of outlawry.

(*i*) After a plea of outlawry has been reversed, the plaintiff may, on payment of costs, obtain an order to proceed with the cause (*Hunter* v. *Ayre*, 23 Beav. 15; *Hunter* v. *Nockolds*, 6 Hare, 459. See, too, *Peyton* v *Ayliffe*, 2 Vern. 312).

Reversal of plea.

The costs are 20*s*. (*Hunter* v. *Nockolds*, l. c.).

Rule 6. Plea of former suit for same matter.

6. The dependency of a former suit for the same matter is a good plea (*j*). But where the plaintiff disputes the truth thereof, he may, on motion or petition of course, obtain an order for an inquiry as to the truth thereof. And such order, and a certificate in pursuance thereof, shall be obtained within one month after the filing of such plea: otherwise the defendant may obtain, as of course, an order to dismiss the bill with costs (22nd May, 1661; Sanders, 299).

(*j*) See note to next rule.

Rule 7. Plea of a suit in inferior court of equity.

7. Where, after a suit commenced in any inferior court of equity, a bill is exhibited in this court to be relieved for the same matter, the dependency of the former suit shall be admitted as a good plea, and shall be proceeded on as in the case of a plea of a former suit

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depending in this court for the same matter (22nd May, 1661; Sanders, 299) (*k*).

Plea of dependence of other suit.

How supported.

(*k*) As to this plea and the averments necessary to support it, see Daniell, 583—4; Mitf. 287 note, 289. It seems that in order to support such a plea, the second bill must be brought by the same person *in the same right* (*Huggins* v. *York Building Company*, 2 Atk. 44); but not necessarily between the same parties (*Moore* v. *Welsh Copper Company*, 1 Eq. Ca. Ab. 39).

Plea of *former decree* or dismissal.

Somewhat similar is the plea of a former decree or order of dismissal, see *Moss* v. *Anglo-Egyptian Company*, 1 L. R. Ch. 108; *Hunter* v. *Stewart*, 10 W. R. 176; Ayckb. 204; but a suit stayed for want of prosecution cannot be pleaded in bar, *Brendlyn* v. *Ord*, 1 Atk. 571.

Decree must be enrolled.

A former decree, in order to be pleaded, must have been enrolled (*Anon.* 3 Atk. 809; *Kinsey* v. *Kinsey*, 2 Ves. Sen. 577; but see *Pearse* v. *Dovinson*, 1 L. R. Eq. 241), and it must be final (*Senhouse* v. *Earl*, 2 Ves. Sen. 449, where the plea was of a conditional decree for foreclosure), and as extensive as the decree sought in the second suit (*Pickford* v. *Hunter*, 5 Sim. 122; see note (*a*), p. 393, *ante*; and *Ellice* v. *Roupell* (No. 1), 32 Beav. 299).

What decrees may be pleaded.

Decrees in what courts may be pleaded.

A decree in a colonial court may be pleaded, as there is an appeal from that court to the Appellate Court of the Privy Council in this kingdom (*Henderson* v. *Henderson*, 3 Hare, 160; and see *Farquharson* v. *Seton*, 5 Russ. 45; *Partridge* v. *Usborne*, *id.* 195; *Hunter* v. *Stewart*, 10 W. R. 176). So a decree in Scotland may be pleaded (*Marquis of Breadalbane* v. *Marquis of Chandos*, 2 M. & Cr. 732). But not the decree of a foreign court, *semble* (*Henderson* v. *Henderson*, 3 Hare, 118). So after decree the Court will restrain a plaintiff from proceeding for the same matter in Scotland (*Wedderburn* v. *Wedderburn*, 2 Beav. 207); or Ireland (*Booth* v. *Leycester*, 3 M. & Cr. 459); or in a colonial court (*Bunbury* v. *Bunbury*, 1 Beav. 381.

Staying proceedings in other courts after decree.

Plea of arbitration not good.

An agreement to submit the affairs of a partnership to arbitration, and that the submission shall be made a rule of a court of common law, cannot be pleaded in bar to a suit in equity, seeking discovery and praying for an injunction and receiver (*Cooke* v. *Cooke*, 4 L. R. Eq. 77).

Compare generally the cases on staying proceedings where two suits for the same purpose are instituted in different branches of the court, *ante*, p. 393, and also note (*l*), p. 535, *post*, as to dismissing bills owing to the plaintiff not having paid costs of abandoned proceedings.

Rule 8. Demurrers and pleas not bad because not covering so much of bill as they might.

8. No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea does not cover so much of the bill as it might by law have extended to (26th Aug. 1841; Ord. 36) (*l*).

Application of rule.

(*l*) This rule only applies to accidental slips, see *Dell* v. *Hale*, 2 Y. & C. 1, Mitf. Plead. 248. And a defendant who puts in a partial demurrer, accompanied by an answer, must distinguish precisely the part of the bill which is demurred to, *Chetwynd* v. *Linden*, 2 Ves. Sen. 450; *Weatherhead* v. *Blackburn*, 2 V. & B. 121; *Osborne* v. *Jullion*, 3 Drew. 552; *Hicks* v. *Raincock*, 1 Cox, 41.

Rule 9. Demurrers and pleas not bad because covering a part to which the answer extends.

9. No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant extends to some part of the same matter as is covered by such demurrer or plea (26th Aug. 1841; Ord. 37) (*m*).

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(*m*) This rule only applies to accidental slips, and does not allow a defendant to raise two distinct defences by plea and answer, or demurrer and answer, see *Mansell* v. *Feeney*, 2 J. & H. 313; where a plea denying a partnership put in to a bill filed to establish the partnership, and accompanied by an answer raising the question of lapse of time and other issues, was held bad in form and substance. So, too, when a defendant, after the time allowed for demurring alone, filed a pleading which was a demurrer, and also an answer to the whole bill, it was held that notwithstanding this rule the answer overruled the demurrer, *Emmott* v. *Mitchell*, 9 Jur. 170; *Skey* v. *Garlike*, 1 De G. & Sm. 396.

Answer overruling plea or demurrer.

So a defendant cannot put in a demurrer to the whole bill accompanied by a plea to the whole bill (*Lowndes* v. *Garnett and Moseley Gold Mining Company Limited*, 2 J. & H. 282).

It was contended in *Esdaile* v. *Molyneux*, 2 Coll. 636, that this and the preceding rule authorised a defendant, who had answered the original bill, to plead to an amended bill. But it seems that the rules do not apply to such a case, and that the defendant can only adopt that course where the amended bill seeks to extend, vary, or restrict the case made by the original bill, or when the defendant can show that some material fact came to his knowledge since putting in the answer (*ibid.*); *Ellice* v. *Roupell*, 32 Beav. 299; *Attorney-General* v. *Cooper*, 8 Hare, 166; *Wyllie* v. *Ellice*, 6 Hare, 505, 515; and see *Ellice* v. *Goodson*, 3 M. & Cr. 653, where the defendant had answered the original bill, and then, when amendments had been introduced not materially varying the case, demurred to the amended bill, and it was held that the answer overruled the demurrer. *Secus*, where the amendments change the nature of the case (*Cresy* v. *Bevan*, 13 Sim. 354).

Pleading and demurring to amended bill after answering original bill.

Rule 10. Statement in petition for setting down plea or demurrer.

10. Every petition praying that a plea or demurrer may be set down (*n*) to be argued, shall state whether the bill to which such plea or demurrer is put in is marked with the words "Lord Chancellor," or with the words "Master of the Rolls," and if with the words "Lord Chancellor," then to which of the Vice-Chancellors' Courts the cause is attached (5th May, 1837; Ord. 5).

(*n*) See as to setting down pleas and demurrers, Registr. Regul. March, 1860, Appendix, p. lxxx. *post*.

Rule 11. Demurrers and pleas not to be entered with registrar.

11. A demurrer or plea need not be entered with the Registrar; but upon the filing thereof by a defendant either party is to be at liberty to set the same down for argument immediately (8th May, 1845; Ord. 44) (*o*).

Demurrers when set down.

(*o*) See *Egremont* v. *Cowell*, 5 Beav. 617, under the 36th Order of Aug. 1841. Demurrers in Rolls Causes are put into the paper two days; in Vice-Chancellor's causes six days after they are set down.

Rule 12. Costs of plea or demurrer overruled.

12. Where any plea or demurrer is overruled, the defendant shall pay to the plaintiff the taxed costs occasioned thereby, unless the Court shall otherwise direct (3rd April, 1828; Ord. 32) (*p*).

Costs.

(*p*) An exception to this case occurs in the case of a demurrer *ore tenus*. As to the costs of such demurrer, and of those of the demurrer on the record, see

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rule (1), *ante*, and note (*c*). As to costs when a plea is ordered to stand for an answer, see *Yarnall* v. *Rose*, 2 Keen, 3261 ; Morgan & Davey on Costs, 18.

Where a demurrer on two grounds fails as to one and succeeds as to another, no costs will be given (*Benson* v. *Hadfield*, 5 Beav. 546). On reversing an order allowing a demurrer the costs were ordered to be refunded (*Oats* v. *Chapman*, 1 Ves. S. 541).

Rule 13. Costs of demurrer allowed.

13. Where a demurrer to the whole or part of a bill is allowed upon argument, the plaintiff, unless the Court shall otherwise direct (*q*), shall pay to the demurring party the costs of the demurrer, and where the demurrer is to the whole bill, the costs of the suit also (8th May, 1845 ; Ord. 45).

Demurrer allowed without costs.

(*q*) But when the bill charged fraud and collision, a demurrer on the ground that the charges of fraud were too general, and that specific acts of fraud must be charged, was allowed without costs, on the ground that by the demurrer the defendant had admitted the existence of fraud (*Bothomley* v. *Squire*, 1 Jur. N. S. 694) ; and see *Schneider* v. *Lizardi*, 9 Beav. 461, where it was held, notwithstanding this rule, that the costs of a demurrer were in the discretion of the Court, and that to some extent the statements in the bill, though admitted only for the purposes of the demurrer, would be regarded.

With costs of suit, including pending motions.

The order allowing a demurrer with costs, carries with it the costs of a pending motion, *Gladstown* v. *Ottoman Bank*, 1 N. R. 512. And where a motion for an injunction stood over at the request of a defendant who had then filed a demurrer which was allowed on appeal, and plaintiff was ordered to pay the costs of the demurrer and the costs of suit, it was held that the costs incurred on the motion were costs of suit (*Finden* v. *Stevens*, 12 Jur. 319, overruling s. c. 11 Jur. 898).

Rule 14. Where demurrer to whole bill sufficient, without being set down.

14. Where a demurrer to the whole bill is not set down for argument within twelve days (*r*) after the filing thereof, and the plaintiff does not within such twelve days serve an order for leave to amend the bill (*s*), the demurrer shall be held sufficient to the same extent and for the same purposes, and the plaintiff shall pay to the demurring party the same costs as in the case of a demurrer to the whole bill allowed upon argument (8th May, 1845 : Ord. 46, and Ord. 16, Art. 17) (*t*).

Costs.

Setting down demurrer after twelve days, *not* generally allowed.

(*r*) Vacations are not reckoned in the computation of the twelve days, Ord. XXXVII. 13 (3), and see *Charlton* v. *Richmond*, 4 Beav. 397.

As to allowing a demurrer to be set down after twelve days have expired, see *Knight* v. *Marjoribanks*, 14 Sim. 198, where such an application, grounded on the alleged pecuniary embarrassments of the plaintiff's solicitor, of which the plaintiff was previously aware, was refused (see *Powell* v. *Corfield*, 7 Jur. 1124) ; and in *Matthews* v. *Chichester*, 11 Jur. 49, overruling s. c. 5 Hare, 207, the plaintiff having neglected to comply with this rule, and his bill being consequently out of court, the Court refused to allow it to be restored.

Amendment in consequence of demurrer, &c.

(*s*) A demurrer was served and set down, and a common order to amend was subsequently obtained at the Rolls, it was held that the case not being one for a common order to amend, plaintiff must pay the costs (*Hoflick* v. *Reynolds*, 9 W. R. 398). See note (*l*), p. 411, *ante*.

The costs of demurrer prepared, but not filed before the bill is amended, are payable by plaintiff (*Bainbrigge* v. *Moss*, 3 K. & J. 62).

(*t*) The defendant had formerly to move for these costs *ex parte* (*Mackenzie* v. *Claridge*, 6 Beav. 123; *Turner* v. *Sampson*, 8 Jur. 1134). But the order is now of course (*Jacobs* v. *Hooper*, 1 W. R. 61); see as to the effect of defendant's laches on the costs, *Campbell* v. *Joyce*, 2 L. R. Eq. 377.

Costs of demurrer prepared, &c.

Costs how obtained by defendant.

15. Where a demurrer to part of a bill is not set down for argument within three weeks after the filing thereof, and the plaintiff does not within such three weeks serve an order for leave to amend the bill, the demurrer shall be held sufficient to the same extent and for the same purposes, and the plaintiff shall pay to the demurring party the same costs, as in the case of a demurrer to part of a bill allowed upon argument (8th May, 1845; Ord. 47, and Ord. 16, Art. 18) (*u*).

Rule 15. Where demurrer to part of a bill sufficient without being set down.

Costs.

(*u*) See the preceding note.

16. Where a plea to the whole or part of a bill is allowed upon argument (*v*), the plaintiff, unless he undertakes to reply to the plea (*w*), or unless the Court otherwise directs, shall pay to the party by whom the plea is filed the costs of the plea, and, where the plea is to the whole bill, the costs of the suit also; and in such last-mentioned case the order allowing the plea shall direct the dismissal of the bill (8th May, 1845; Ord. 48).

Rule 16. Costs of plea allowed.

When plea to whole bill allowed, bill to be dismissed.

(*v*) See note (*p*), *ante*, notes to rr. 12, 13, as to the costs of a plea ordered to stand for an answer.

Plea standing for answer.

(*w*) As to costs, where the plaintiff having set the plea down for argument, moves that it may not be in the paper, see *Jones* v. *Wattier*, 4 Sim. 128; *Lopes* v. *De Tastet*, 3 Mad. 183.

Where defendant does not argue plea.

Where a plea to the whole bill was allowed, the plaintiff, although he undertook to reply to the plea, was compelled to pay the costs of it, but the other costs of suit were reserved (*Fry* v. *Richardson*, 10 Sim. 475).

Where plaintiff undertakes to reply.

17. Where a plea to the whole or part of a bill is not set down for argument within three weeks after the filing thereof, and the plaintiff does not within such three weeks either serve an order for leave to amend the bill, or by notice in writing undertake to reply to the plea, the plea shall be held good to the same extent, and for the same purposes, and the same costs shall be paid by the plaintiff, as in the case of a plea to the whole or part of a bill

Rule 17. Where plea sufficient, without being set down for argument.

Costs.

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When plea so sufficient, bill to be dismissed.

allowed upon argument (*x*). And where the plea is to the whole bill (*y*), the defendant by whom such plea was filed may at any time after the expiration of such three weeks obtain as of course an order to dismiss the bill (8th May, 1845 : Ord. 49, and Ord. 16, Art. 19).

What is plea to whole bill.

(*x*) Under the old practice, the defendants had to apply for their costs on notice to the other side, *Roberts* v. *Jones*, 13 L. J. Ch. 32; but see now *Jacobs* v. *Hooper*, 1 W. R. 61, and note (*t*), *supra*.

(*y*) A plea to all the relief, but not in form to all the discovery sought by a bill for both discovery and relief, is not a plea to the whole bill. An order of course to dismiss, therefore, obtained after the expiration of the three weeks, was discharged for irregularity (*Neck* v. *Gains*, 1 De G. & Sm. 223).

Rule 18. After undertaking to reply to plea, no proceeding without leave.

18. Where the plaintiff undertakes to reply to a plea to the whole bill, he shall not, without the special leave of the Court, take any proceeding against the defendant by whom the plea was filed till after replication (8th May, 1845; Ord. 50).

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ORDER XV.

ANSWERS (*a*).

Rule 1. Form of answer.

1. Answers may be in a form similar to the form set out in Schedule (C.) (*b*) with such variations as the nature and circumstances of each particular case may require (7th Aug. 1852; 1st Set, Ord. 21).

Defendant who answers must *answer fully*.

(*a*) For the practice as to answers of particular defendants, *e.g.*, married women, see note (*b*), p. 435, *ante*.

Subject to the right of pleading or demurring (see last order), or of claiming protection as to *particular interrogatories*, see rule 4, *infra*, a defendant, *if he answers at all* (*i. e.* if he does not demur or plead to all or part of the discovery), *must answer fully* (see note (*e*), p. 453, *post*), *Great Luxemburg Railway Company* v. *Magnay*, 23 Beav. 646; *Swabey* v. *Sutton*, 1 H. & M. 514, 12 W. R. 124; *Howe* v. *M'Kerman*, 30 Beav. 547; *Robson* v. *Flight*, 33 Beav. 268; *Foxwell* v. *Webster*, 2 Dr. & Sm. 250. Thus, in a creditor's suit, an executor defendant cannot refuse accounts because he denies by his answer that the plaintiff is a creditor, for there are many intermediate steps as to which an answer may be material, *e. g.* the appointment of a receiver, see *De La Rue* v. *Dickinson*, 3 K. & J. 391.

He may plead or demur, but not move to dismiss or ask for an

It follows that a defendant cannot move to dismiss a bill instead of pleading to it or answering it on the ground that the plaintiff has no *bonâ fide* interest, *Seaton* v. *Grant*, 2 L. R. Ch. 459; see *Morgan* v. *Great Eastern Railway Company*, 11 W. R. 662. Nor can he have an issue directed before answer, and thereby

avoid giving discovery, *Foxwell* v. *Webster*, 2 Dr. & Sm. 250; nor can he demur to part of the bill, declining to answer the rest, unless the time for filing interrogatories has expired and no answer is required (note (*w*), p. 167, *ante*).

(*b*) See Appendix, p. iv. *post*; and Order 6th March, 1860, by which answers are required to be *printed*; and as to the title of an answer, *Rabbeth* v. *Squire*, 10 Hare, App. iii.; and of an answer and demurrer, *Osborne* v. *Jullion*, 3 Drew, 552; and see as to form of answers, 15 & 16 Vict. c. 86, s. 14, p. 168, *ante*; *Patrick* v. *Blackwell*, 17 Jur. 803; Daniell, 668, 674.

Where an error was discovered in an answer after it had been sworn, but before it was filed, the original jurat was ordered to be cancelled, and the answer to be filed as re-sworn, *Attorney-General* v. *The Governors of Donnington Hospital*, 17 Jur. 206; and compare as to correcting the title of an answer, *Thatcher* v. *Lambert*, 5 Hare, 228; and *Attorney-General* v. *Corporation of Worcester*, 2 Ph. 3.; and see note (*a*) p. 463, *post*, as to correcting the title of affidavits. In an older case, *Griffiths* v. *Wood*, 11 Ves. 62 (followed in *Cope* v. *Parry*, 1 Madd. 83; and *Fry* v. *Mantell*, 4 Beav. 485), an answer in which a misnomer occurred, was ordered to be taken off the file as no answer.

An answer prepared for five cannot be sworn to as the answer of three only (*Harris* v. *James*, 3 Bro. C. C. 398; *Cooke* v. *Westall*, 1 Madd. 265), unless by consent (*Done* v. *Read*, 2 V. & B. 310). *Secus* as to pleas, see note (*c*) to Ord. XIV. 2, p. 444, *ante*.

If a defendant is desirous of correcting his answer after it has been filed, he must apply for liberty to file a supplemental answer. See *Wells* v. *Wood*, 10 Ves. 401; *Dolder* v. *Bank of England*, *id.* 284; *Edwards* v. *McLeay*, 2 V. & B. 256; *Jennings* v. *Merton College*, 8 Ves. 79; *Phelps* v. *Prothero*, 2 De G. & Sm. 274. Leave to file the supplemental answer (unless by consent) must be obtained by motion in court after notice, and the notice must specify the new fact intended to be introduced: thus, if a defendant desires to add a new issue to issues directed for trial, he should raise it by supplemental answer, *Morgan* v. *Fuller*, 2 L. R. Eq. 296. And where a party, owing to an error in the instructions, was by his answer made to admit what was contrary to the fact, the Court allowed him to file a supplemental answer on payment of costs, *Cooper* v. *Uttoxeter Burial Board*, 1 H. & M. 680; but proof of the mistake must be produced before leave will be given, *Churton* v. *Frewen*, 1 L. R. Eq. 238. The application must be by motion in court, not by summons in chambers (*ibid.*).

After it is filed by supplemental answer.

Raising a new issue.

or correcting mistake in fact.

See as to amendments by a defendant of particulars of objections to a patent, *Penn* v. *Bibbey*, 1 L. R. Eq. 548.

Where a defendant throughout his answer referred to a printed document, which was not filed as an exhibit, the answer was held to be incomplete without the printed document, *Lafone* v. *Falkland Islands Company*, 3 K. & J. 267). Compare *Mylessi* v. *Spartali*, 29 Beav. 564; and *Telford* v. *Ruskin*, 1 Drew. & Sm. 148; where the answer of a defendant, who was required to set forth certain accounts, referred to a book not scheduled in the answer, in which such accounts were set out, and the answer was held insufficient. And even where the account-books, which were of great size and very numerous, had been scheduled, it was held incumbent on the defendant to point out specifically the portions from which the plaintiff could obtain the information sought (*Drake* v. *Symes*, Johns. 547; and see *White* v. *Williams*, 8 Ves. 193; *Christian* v. *Taylor*, 11 Sim. 401; *Baily* v. *Kenrick*, 13 Price, 291; *Boldero* v. *Saunders*, 3 N. R. 59). A schedule of excessive length will be held impertinent (*Norway* v. *Rowe*, 1 Meriv. 355).

Answer referring to other documents, accounts, &c.

Schedules.

A defendant cannot, as a general rule, avail himself of any defence which appears only on his evidence, and is not stated in his answer (*Stanley* v. *Robinson*, 1 R. & M. 527; *Harrison* v. *Barwell*, 10 Sim. 382; and see cases cited, note (*a*), p. 168, *ante*, as to pleading by affidavit, the Statute of Limitations, &c., where an answer is not required); but where, though a substantial defence is not expressly raised by the answer, the facts on which it rests are alleged and substantiated by the answer, such defence will be held available, *Ormes* v. *Beadel*, 2 D. F. J. 333. See, however, *Holderness* v. *Rankin*

Defence must be put in issue by answer,

and may be supported,

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or by cross interrogatories, or cross bill.

(*ibid.* 258). A cross bill or cross interrogatories may be necessary in support of the defence; thus, a defendant, if he has reason to believe that the plaintiff has parted with his interest in the subject matter of his suit, should file cross interrogatories, and if he only takes the objection by his answer, the Court will not attend to it, *Clark* v. *Malpas*, 10 W. R. 613.

As to where a cross bill is necessary, see *Jacob* v. *Richards*, 18 Beav. 300, 5 D. M. G. 55; *Hannah* v. *Hodgson*, 30 Beav. 19, and note (*x*), p. 178, *ante*.

Answer after revivor and amendment.

As to putting in an answer after order of revivor, see *Martin* v. *Purnell*, 3 W. R. 395, cited in note (*m*), p. 216, *ante*. And as to answer to amended bill, see *Drake* v. *Symes*, 2 D. F. J. 81, and note (*j*), p. 411, *ante*.

Elusory answer, taken off the file.

Where a defendant, to gain time, filed an elusory answer to one interrogatory only, hoping to gain time by driving the plaintiff to take exceptions, his answer was ordered to be taken off the file (*Read* v. *Barton*, 3 K. & J. 166; and see *Lynch* v. *Lecesne*, 1 Hare, 626; *Financial Corporation* v. *Bristol, &c. Railway Company*, 3 L. R. Eq. 422). But an answer, however clearly evasive, cannot be taken off the file after it has been excepted to, *Glassington* v. *Thwaites*, 2 Russ. 458.

Answer admitted sufficient.

As to where an answer is admitted sufficient, see note (*n*), pp. 458, 459, *post*.

Rule 2. Facts if denied to be traversed directly.

2. When a defendant denies a fact, he must traverse or deny it directly, and not by way of negative pregnant: As, for example, where he is interrogated whether he has received a sum of money, he must deny or traverse that he has received that sum, or any part thereof, or else set forth what part he has received. And so where a fact is alleged, with divers circumstances, the defendant must not deny or traverse it literally, as it is alleged in the bill, but must answer the point of substance positively and certainly (22nd May, 1661; Sanders, 299) (*c*).

Answer must traverse interrogatory.

(*c*) The answer must traverse with accuracy such parts of an interrogatory as are not intended to be admitted (*Patrick* v. *Blackwell*, 17 Jur. 803). And every interrogatory founded on a specific averment must be specifically answered (*Earp* v. *Lloyd*, 4 K. & J. 58). But when substantial information is given by the answer, though not technically, exceptions will be discouraged (*Reade* v. *Woodroffe*, 24 Beav. 421).

Omission to answer specific interrogatory.

An interrogatory asked whether certain sums had not come to the defendant's hands, and whether he had not applied the same to certain purposes? The defendant denied that any sums had come to his hands, but did not answer the remainder of the interrogatory. It was held that the answer was sufficient (*The Duke of Brunswick* v. *The Duke of Cambridge*, 12 Beav. 280).

As to persons named.

An interrogatory asked whether the defendant had not had communication with A. B. and C. D., and other persons? The answer admitted communications with A. B., but denied any with any other persons, omitting the name of C. D. It was held that the defendant being specially interrogated as to C. D., the general answer was insufficient (*ibid.*).

As to correspondence.

A bill alleged that the defendant in the course of a correspondence made certain representations, and an interrogatory required him to set forth a list of the correspondence. An answer stating that the correspondence contained no such representations was insufficient, *Riskton* v. *Grissel*, 14 W. R. 578.

As to resources, means of payment, &c.

A son was interrogated, in respect of a purchase from his father with whom he had been living, which was impeached by the bill as fraudulent and without consideration, as to his own pecuniary resources, whence derived, and the amount, value, and income thereof, and also out of what funds, &c., he had

obtained the means of paying the consideration money. To the first interrogatory he answered that he had pecuniary resources of his own, partly arising from property of his own, and partly his wife's, without stating the value. To the second, that he had paid 4,000*l.* by money belonging to him, and at the time in his father's hands, and the remaining 7,000*l.* by a cheque on his bankers. Upon the circumstances charged in the bill, it was held that the answers to both interrogatories were insufficient (*Newton* v. *Dimes*, 30 L. T. 30).

Specific answer.

When on a specific averment of a conveyance to S., the words "or to some and what person or persons," are added in the interrogatory, the party interrogated is not thereby relieved from answering specifically as to the alleged conveyance from S. (*Earp* v. *Lloyd*, 4 K. & J. 58).

Reference to documents.

A defendant must answer precisely and directly, and cannot refer to a schedule which he does not in the usual form pray may be taken as part of his answer, *Boldero* v. *Saunders*, 3 N. R. 59, and see note (*b*), p. 451, *ante*.

What discovery protected.

But a defendant may refuse to answer irrelevant interrogatories, see Ord. XVI. 4, p. 456, *infra*; and as to special reasons for objecting to discovery, see note (*r*), p. 175, *ante*, as to protected documents.

See further, as to answering interrogatories, *Aldridge* v. *Westbrook*, 4 Beav. 212; and *Bate* v. *Bate*, 7 Beav. 528; *Inman* v. *Whitley*, 4 Beav. 548; *Att.-Gen.* v. *Rees*, 12 Beav. 50; *Dixon* v. *Fraser*, 2 L. R. Eq. 497; *Bridgewater* v. *De Winton*, 12 W. R. 40.

Rule 3. Defendant not bound to answer unless especially interrogated.

3. A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto (*d*). And a defendant shall not be bound to answer any of the interrogatories for the examination of the defendants, except those interrogatories which such defendant is required to answer. And where a defendant answers any statement or charge in the bill, to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent (26th Aug. 1841; Ord. 16).

General inquiry.

(*d*) A plaintiff in a patent suit was held not entitled to discovery from the defendant in answer to a general interrogatory as to the instances of prior user, on which he relied, *Bovill* v. *Smith*, 2 L. R. Eq. 459.

Rule 4. Defendant may decline answering interrogatory, to which he might have demurred.

4. A defendant shall be at liberty by answer to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by *demurrer* (*e*), and he shall be at liberty so to decline, notwithstanding he shall answer other part of such interrogatory or other interrogatories from which he might have protected himself by demurrer, or other parts of the bill as to which he was not interrogated (26th Aug. 1841; Ord. 38).

Defendant may demur to particular *dis-*

(*e*) Demurrer here means *demurrer to the particular discovery* and not a general demurrer to the whole bill, Seton, 1655. Thus, in *Mason* v. *Wake-*

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man, 2 Ph. 516, Lord Cottenham held in accordance with V.-C. Knight Bruce, that a defendant could not decline to answer any one interrogatory on the ground only that the bill was open to a general demurrer. This case was followed in *Fisher* v. *Price*, 11 Beav. 194; and see *Stainton* v. *Chadwick*, 13 Beav. 320; *Attorney-General* v. *Corporation of London*, 12 Beav. 21, and note (*a*), p. 450, *ante*.

covery under the rule; but if he gives partial discovery he cannot decline to answer fully on the ground that the *whole relief* might have been *demurred to*.

These cases may be considered as having settled that the order points to objections to discovery and has no reference to relief; and this was the doctrine laid down by V.-C. Knight Bruce, in *Baddely* v. *Curwen*, 2 Coll. 151 (decided under the old order), where on a bill by a legatee against an executor and a person alleged to have possessed himself of the testator's assets, it was held that the bill might have been demurred to by the second defendant on the ground of there not being sufficient charges of collusion between the defendants; that course, however, was not taken, but the second defendant, by answer, stated his belief of the allegations in the bill as to the will, probate, &c., but declined to answer the rest of the bill, and claimed the same benefit from his answer as if he had demurred to the relief sought by the bill, and to so much of the discovery sought by the bill as had not been met by the answer, and this answer was held insufficient. See, too, *Molesworth* v. *Howard* (*ibid.* 145), and *Fairthorne* v. *Weston*, 3 Hare, 387, 393, where it was said that the order was not meant to enable the defendant to put in a short answer and refuse all further discovery; and where an answer to an interrogatory, accompanied by a submission that the bill was demurrable, was held insufficient. And the contrary decisions of *Drake* v. *Drake*, 2 Hare, 647; *Tipping* v. *Clarke*, 2 Hare, 383; and *Kaye* v. *Wall*, 4 Hare, 127, 283, may be considered as overruled by *Mason* v. *Wakeman*, *supra*. So in *Marsh* v. *Keith*, 1 Drew. & Sm. 342, it was held that where the bill prayed alternative relief, and each branch of the relief prayed was in effect complete relief, a defendant could not protect himself from answering fully on the ground that as to one branch of the relief he might have demurred. See *Bates* v. *Christ's College*, 26 L. J. Ch. 449.

As to the grounds on which a defendant may demur to answering particular interrogatories, see cases cited as to protection of documents in note (*r*), p. 175, *ante*.

Rule 5. Signature by parties swearing answer.

5. All answers shall be signed by the parties swearing the same, and such signature shall be affixed or acknowledged in the presence of the persons before whom the same are sworn (27th April, 1748) (*f*).

(*f*) As to the answer of an illiterate person, see *Wilton* v. *Clifton*, 2 Hare, 535.

Rule 6. Answers to be on oath.

6. Unless the Court shall otherwise direct, the answers of all persons (except persons entitled to the privilege of peerage, or corporations aggregate) shall be put in upon the oath of the parties putting in the same, where they are not exempted from taking an oath by any statute in that behalf (*g*). Persons entitled to the privilege of peerage may answer upon protestation of honour, and corporations aggregate shall put in their answer under their common seal (26th Oct. 1842; Ord. 7. 31st Dec. 1640. 26th May, 1685).

Form of jurat to answer.

(*g*) The 15 & 16 Vict. c. 86, s. 21, p. 179, *ante*, does not alter the form of oath to be administered to a defendant on putting in his answer (*Attorney-*

General v. *Hudson* or *Henderson*, 9 Hare, App. lxiii. Thus the jurat to a joint and several answer may still be qualified as to the defendant's belief of the truth of other acts than his own (*ibid.*). When a jurat had been partially cancelled by an officer of the court it was directed to be resworn in the original form (*ibid.*; and see *Attorney-General* v. *Donnington Hospital*, 22 L. J. Ch. 706). See further as to swearing answers, note (*b*), p. 451, *ante*.

As to the London Commissioners for taking Oaths, see 16 & 17 Vict. c. 78, p. 230, *ante*; and as to swearing answers, &c., abroad, see 15 & 16 Vict. c. 86, sect. 22, p. 180, *ante*.

Order XV. Answers.

ORDER XVI.

Exceptions to Answer (*a*).

Order XVI. Exceptions to Answer.

1. When a plaintiff excepts to an answer for insufficiency, he shall take his exceptions in writing, signed by counsel (22nd May, 1661; Sanders, 300).

Rule 1. Exceptions for insufficiency how taken.

(*a*) Exceptions for impertinence are abolished by 15 & 16 Vict. c. 86, s. 17, p. 171, *ante*.

As to moving to take an elusory answer off the file instead of excepting to it, see *Read* v. *Barton*, cited in note (*b*), p. 452, *ante*; for form of exceptions, see Daniell, Vol. III. 705. They should be headed, "Exceptions taken by, &c., to the answer of the defendant, &c. to the bill of complaint of, &c. for insufficiency" (*Earl of Lichfield* v. *Bond*, 5 Beav. 513). But in *Bradstock* v. *Whatley*, 6 Beav. 61, leave was given to amend the title on payment of costs.

Taking answer off the file.

Title and form of exceptions.

They should follow the words of the interrogatories. But if they plainly point out the passages to which they apply (*Woodroffe* v. *Daniell*, 10 Sim. 243); or if the variation be trifling (*Hodgson* v. *Butterfield*, 2 Sim. & St. 236; *Brown* v. *Keating*, 2 Beav. 581); they will not necessarily fail, especially if they contain a reference to the number of the interrogatory (*Esdaile* v. *Molyneux*, 1 De G. & S. 218); and *semble*, such a practice might save the necessity of setting out the interrogatory itself (*ibid.*).

If an exception for insufficiency is well founded in any respect, the exception is allowed, *Renard* v. *Levinstein*, 3 N. R. 665.

Where an exception for insufficiency is *partly* well founded.

Where, however, one interrogatory embraced six questions, five of which were sufficiently answered, an exception to the whole interrogatory was held to be wrong in point of form (*Higginson* v. *Blockley*, 4 W. R. 60; but see, *contrà*, *Hambrook* v. *Smith*, 17 Sim. 209). Where a plaintiff takes no exception to the answer to the original bill, he cannot except to the answer to the amended bill on grounds which would have applied equally to the answer to the original bill (*Ovey* v. *Leighton*, 2 S. & S. 234). See note (*n*), p. 458, *post*.

Exceptions to answer to amended bill.

Costs of exceptions.

Whether exceptions are allowed (*Newton* v. *Dimes*, 3 Jur. N. S. 583), or overruled (*Stent* v. *Wickens*, 5 De G. & Sm. 384), the costs will be ordered to follow the result (comp. *Willis* v. *Childe*, 13 Beav. 454); and such costs are payable immediately (*Thomas* v. *Rawling*, 27 Beav. 375). But it seems they should be *asked for* by the successful party (*Earp* v. *Lloyd*, 4 K. & J. 58; *Crossley* v. *Stewart*, 2 N. R. 57). But where an interrogatory includes several questions which ought to be distinct, and exceptions as to such interrogatory are only partly allowed, the defendant has not to pay costs, *Langley* v. *Waite*, 15 W. R. 53.

Where some exceptions are allowed and others overruled, the costs of those allowed ought to be set off against those overruled (*Willis* v. *Childe*, l. c.;

ORDER XVI. Exceptions to Answer.

Dally v. *Worham*, 32 Beav. 69 ; and for form of orders, see Seton, 1256). As to costs of exceptions submitted to, see Ord. XL. r. 13 ; and see Morgan and Davey, 27—29.

Rule 2. Exceptions for scandal how taken.

2. No pleading or other matter depending before the Court shall be set down for hearing for scandal, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are alleged to be scandalous (2nd Nov. 1850 ; Ord. 23) (*b*).

(*b*) Unless it appears that the passages objected to as scandalous would be immaterial at the hearing, the Court will disallow the exceptions, *Anon.* 10 W. R. 617.

Rule 3. Filing and giving notice of filing exceptions.

3. Where any exceptions for scandal or insufficiency are taken, the solicitor of the party taking the same, or the party himself where he acts in person, shall leave such exceptions at the Record and Writ Clerks' Office to be filed, and shall on the same day give notice of the filing thereof to the solicitor for the opposite party, or to the opposite party himself where he acts in person (26th Oct. 1842 ; Ord. 5 and 24) (*c*).

Accidental omission to give notice.

(*c*) When a party accidentally omitted to give the notice, the Court relieved him from the irregularity on payment of costs (*Bradstock* v. *Whatley*, 6 Beav. 61 ; and see *Lowe* v. *Williams*, 12 Beav. 482 ; *Lord Suffield* v. *Bond*, 10 Beav. 146, and notes to Ord. III. 9, p. 389, *ante*).

Rule 4. Relevancy or materiality of statement or question to be considered.

4. In deciding on the sufficiency or insufficiency of any answer or examination, the relevancy or materiality of the statement or question referred to shall be taken into consideration (3rd April, 1828 ; Ord. 74) (*d*).

Relevancy of question.

(*d*) See *Marsh* v. *Keith*, 1 Drew. & Sm. 342 ; *Reade* v. *Woodroffe*, 24 Beav. 421 ; *Wood* v. *Hitchings*, 3 Beav. 504 ; and as to irrelevancy, see note on p. 176, *ante*.

Rule 5. Exceptions nunc pro tunc

5. No order shall be made for leave to file exceptions *nunc pro tunc* (2nd Nov. 1850 ; Ord. 6) (*e*).

No order even by consent.

(*e*) The 17th Order of May, 1845, is to the same effect. Under this order it was held that an order for leave to file exceptions, *nunc pro tunc*, cannot now be made even by consent (*Biddulph* v. *Camoys*, 9 Beav. 155) ; but a special order may be made for referring (*quære* filing) them, notwithstanding that the time has elapsed (*ibid.* ; and see *Whitmore* v. *Sloane*, *ibid.* 1).

Rule 6.

6. After the filing of an answer, the plaintiff shall have

six weeks within which he may file exceptions thereto for insufficiency (*f*). Where he does not file exceptions within six weeks, such answer on the expiration of the six weeks shall be deemed sufficient (2nd Nov. 1850; Ord. 8) (*g*).

ORDER XVI. Exceptions to Answer.

Time for filing exceptions for insufficiency.

(*f*) This rule is *verbatim* the same as the 22nd article of the old 16th Order of May, 1845, under which it was held that where an answer and plea had been filed, and the plea had been overruled, the six weeks mentioned in the order ran from the overruling of the plea (*Esdaile* v. *Molyneux*, 2 Coll. 641).

From what period time runs.

Under the 4th Order of April, 1828 (Beav. Ord. Canc. 4), the principle of which seems to apply, it was held that where an answer was insufficient, and the plaintiff obtained an order to amend, and that the defendants might answer the exceptions and amendments together, the plaintiff had the full period of two months (by this rule reduced to six weeks) to except (*Lloyd* v. *Clarke*, 6 Beav. 467).

Where a defendant in contempt files his answer without paying the costs, the time for excepting runs from the filing of the answer, not from payment of the costs of contempt (*Coyle* v. *Alleyne*, 16 Beav. 568, following *Nicklin* v. *Patten*, 4 Beav. 126).

In case of defendant in contempt.

(*g*) As to the plaintiff admitting an answer to be sufficient, see note to r. 12, *infra*.

7. No exceptions for insufficiency shall be taken to an answer after replication (29th Jan. 1618-19; Ord. 62).

Rule 7. No exceptions after replication.

8. When a defendant desires to prevent exceptions to his answer for insufficiency being set down for hearing, he shall have for that purpose only eight days after the filing of such exceptions within which he may submit to the same (2nd Nov. 1850; Ord. 9) (*h*).

Rule 8. Time for submitting to exceptions.

(*h*) See note to next rule.

*9. Where a defendant, not being in contempt, submits to exceptions to his answer for insufficiency before the plaintiff has set them down for hearing, he shall have fourteen days (*i*) from the date of the submission within which he is to put in his further answer to the bill (2nd Nov. 1850; Ord. 10) (*j*).

Rule *9. Time for further answer, where exceptions submitted to before set down.

(*i*) In the original order the words are *three weeks* (Beav. Ord. Canc. 433).

Answer where defendant submits to exceptions.

(*j*) Where a defendant submits to exceptions, he need not again answer interrogatories sufficiently answered in his first answer (*Robinson* v. *Anderson*, 2 Eq. Rep. 89; comp. *Duncombe* v. *Davis*, 1 Hare, 184).

10. Exceptions to answers for insufficiency, or to any pleading or other matter depending before the Court for scandal (*k*), shall be set down for hearing by the registrar

Rule 10. Exceptions how set down for hearing.

ORDER XVI. Exceptions to Answer.

at the request of the party filing the same, upon the production of a certificate of the Clerk of Records and Writs of the filing of such exceptions, or (in the case of exceptions to an answer for insufficiency) of the filing of a further answer, and the same shall be advanced and put in the paper for hearing on an early day (*l*); and the party setting down any such exceptions shall, on the day on which the same shall be so set down, serve a notice (*m*) thereof on the party whose pleading or other matter is excepted to; otherwise the exceptions shall be deemed not set down (2nd Nov. 1850; Ord. 12).

(*k*) In the original order the words were scandal *or impertinence*, but see 15 & 16 Vict. c. 86, s. 17, *ante*, p. 171, which abolishes exceptions for impertinence.

Setting down exceptions.

(*l*) Exceptions are to be heard by the Court, 15 & 16 Vict. c. 35, s. 27 (*ante*, p. 130); and as to setting them down, see 5th Registr. Regul., March, 1860, Appendix, p. lxxx., *post*. The plaintiff's solicitor should, before the exceptions are heard, leave a copy of the interrogatories, the answer, and the exceptions with the judge.

Other side may set down if party excepting neglects.

Where a defendant took exceptions to a bill for scandal and neglected to set them down, it was held that the plaintiff was entitled to an order of course for setting them down, and they were afterwards advanced for hearing (*Coyle* v. *Alleyne*, 14 Beav. 171).

(*m*) See note (*c*) to rule 3, *ante*.

Rule 11. Exceptions for insufficiency not to be set down for eight days from filing.

11. Where the plaintiff files exceptions for insufficiency to a defendant's answer, the plaintiff shall not set them down for hearing before the expiration of eight days from the filing of such exceptions, unless in a case of election he shall be required by notice in writing from such defendant to set them down in four days pursuant to the 6th Rule of Order XLII. (2nd Nov. 1850; Ord. 11).

Rule 12. Not to be set down after fourteen days.

12. Where the plaintiff files exceptions for insufficiency to an answer, he shall set them down for hearing after the expiration of eight days, but within fourteen days from the filing of such exceptions; otherwise the answer, on the expiration of such fourteen days, shall be deemed sufficient (2nd Nov. 1850; Ord. 14) (*n*).

(*n*) As to admission of sufficiency, see further rule 16, *post*.

Answer admitted sufficient by *moving for decree*;

Where the plaintiff gave notice of motion for a decree, after exceptions to an answer for insufficiency had been allowed, the Court, it seems, treated him as having waived his right to a further answer (*Boyse* v. *Cockell*, 18 Jur. 770); and see note (*r*), *infra*.

by amendment.

So a plaintiff who amends his bill after answer, admits the answer to be sufficient, and cannot except afterwards to matters which he has not excepted

to on the original answer, *Duncombe* v. *Davis*, 1 Hare, 192; nor can he require an answer to interrogatories already answered, *Drake* v. *Symes*, 2 D. F. J. 81. *Secus* if the amendment is merely formal (see Daniell, 703, 4), for by such amendment the plaintiff does not admit the answer to be sufficient, *Taylor* v. *Wrench*, 9 Ves. 315; *Kaye* v. *Wall*, 4 Hare, 283.

ORDER XVI. Exceptions to Answer.

A voluntary answer is treated as at once sufficient, *Bailey* v. *Dunkerley*, 6 W. R. 835.

Answer admitted sufficient.

As to the meaning of a defendant's "sufficient answer," for the purpose of filing cross-interrogatories or requiring production of documents, see note (*u*) p. 178, and (*a*), p. 179, *ante*.

13. After exceptions to an answer for insufficiency have been filed, and a further answer has been put in, the plaintiff shall have fourteen days from the filing of such further answer within which he may set down the old exceptions. Where the old exceptions are not set down within fourteen days after such further answer has been put in, the answer shall, on the expiration of such fourteen days, be deemed sufficient (2nd Nov. 1850; Ord. 16) (*o*).

Rule 13. Old exceptions when set down.

(*o*) See last note.

14. Where, after exceptions to an answer for insufficiency are set down for hearing, a defendant, not being in contempt, submits to answer, or where the Court holds the first or second answer to be insufficient, the Court may appoint the time within which such defendant shall put in his further answer (2nd Nov. 1850; Ord. 17, 21) (*p*).

Rule 14. Defendant submitting to answer, &c., after exceptions are set down.

(*p*) A defendant in contempt for not putting in a further answer after exceptions allowed cannot apply for further time (*Wheat* v. *Grahame*, 5 Sim. 570).

15. After the allowance of or submission to exceptions to an answer for insufficiency, a defendant shall answer within the time allowed or appointed as aforesaid. And where he does not answer within the time so allowed or appointed, or obtain further time and answer within such further time, the plaintiff may sue out process of contempt against such defendant (8th May, 1845; Ord. 27, 2nd Nov. 1850; Ord. 17).

Rule 15. Consequences of default in answering, after allowance of, or submission to exceptions.

16. The answer of a defendant shall be deemed sufficient (*q*)—

Rule 16. Answer when sufficient.

(1.) Where no exceptions for insufficiency are

Article (1).

ORDER XVI. Exceptions to Answer.

filed thereto within six weeks after the filing of such answer.

Article (2).

(2.) Where, exceptions being filed, the plaintiff does not set them down for hearing within fourteen days after the filing thereof.

Article (3).

(3.) Where, within fourteen days after the filing of a further answer, the plaintiff does not set down the old exceptions (2nd Nov. 1850; Ord. 18).

(*q*) See note (*p*), last page.

Rule 17. Particular matter to which further answer required to be stated in notice.

17. Where, after a defendant's second or third answer is filed, the plaintiff sets down the old exceptions for insufficiency, the particular exception or exceptions to which he requires a further answer shall be stated in the notice of setting down such exceptions (2nd Nov. 1850; Ord. 19) (*r*).

Course when defendant submits to original exceptions set down after further answer.

(*r*) See *Tanner* v. *Strutton*, 15 Jur. 457. When a defendant submits to the original exceptions, set down after a further answer, his better course is not to apply at chambers for further time, by agreeing to which application the plaintiff might possibly be held to waive his exceptions altogether, (see note (*n*), *supra*), but to notify the defendant's submission to the plaintiff, and then to make an arrangement as to the time to be allowed, and to bring that point only before the Court when the exceptions are called on (*The Manchester, &c. Railway Company* v. *The Worksop Board of Health*, 2 K. & J. 25).

Rule 18. Answer to be deemed sufficient or insufficient from date of order on hearing or submission.

18. Where, upon the hearing of exceptions, the answer is held sufficient, it shall be deemed to be so from the date of the order made on the hearing; and where the defendant submits to answer without an order from the Court, the answer shall be deemed insufficient from the date of the submission (2nd Nov. 1850; Ord. 20).

Rule 19. After third insufficient answer, defendant may be committed.

19. Upon a third answer being held to be insufficient, the Court may order the defendant to be examined upon interrogatories to the point as to which it is held to be insufficient, and to stand committed until he shall have perfectly answered the interrogatories; and the defendant shall pay such costs as the Court shall think fit to award (2nd Nov. 1850; Ord. 22) (*p*).

Costs.

Three insufficient answers.

(*p*) See under the old 10th Order of April, 1828 (the procedure under which was imperative), *Balfour* v. *Farquharson*, 1 S. & S. 72; on appeal, Turn. & Russ. 134; *Weston* v. *Joy*, 1 Madd. 527; *Allfrey* v. *Allfrey*, 12 Beav. 620. An order for immediate committal after three insufficient answers is

irregular, *Hayward* v. *Hayward*, Kay, App. xxxi. ; 23 L. J. Ch. 549, (where, however, the examination was on interrogatories in chambers).
This rule does not apply to a defendant making insufficient affidavits as to documents (*Harford* v. *Lloyd*, 2 W. R. 537).

ORDER XVI. Exceptions to Answer.

Rule 20. Exceptions for scandal, when set down.

20. Where any person having filed exceptions for scandal to any pleading or other matter depending before the Court, does not set the same down for hearing within six days after the filing thereof, such exceptions shall be considered as abandoned; and the person by whom such exceptions were filed shall pay to the opposite party such costs as may have been incurred by such party in respect of such exceptions (2nd Nov. 1850; Ord. 24).

Costs.

Rule 21. Expunging scandalous matter.

21. Upon the production of an order allowing exceptions for scandal to any pleading or other matter depending before the Court, the officer having the custody or charge of such pleading or other matter shall expunge from such pleading or other matter such parts thereof as the Court shall have held to be scandalous (2nd Nov. 1850; Ord. 25) (*q*).

(*q*) See *Jodrell* v. *Jodrell*, 12 Beav. 216; *Everett* v. *Prytherych*, 12 Sim. 363. A bill containing scandalous matter was by consent of all parties ordered to be taken off the file (*Makepeace* v. *Romieux*, 8 W. R. 687, and see *Clifton* v. *Bentall*, 9 Beav. 105). A scandalous affidavit may be ordered to be taken off the file (*Goddard* v. *Parr*, 24 L. J. Ch. 783); or the scandalous matter may be expunged (*Re Bailey's Settlement*, 3 W. R. 133).
As to costs in cases of scandal, see Morgan & Davey, 28.

Taking scandalous pleadings off the file, &c.

ORDER XVII.

ORDER XVII. Replication and Joining Issue.

Replication and Joining Issue (*a*).

Rule 1. Replication where defendant is not required to answer, and does not answer.

1. Where a defendant is not required to answer and does not answer the bill, so that under the Stat. 15 & 16 Vict. c. 86, s. 26, he is to be considered as having traversed the case made by the bill, *issue* shall nevertheless be *joined* by filing a replication in a form or to the effect of the replication set forth at the end of this order (7th Aug. 1852; 1st Set, Ord. 28) (*b*).

ORDER XVII. Replication and Joining Issue.

(*a*) As to the practice where a replication is not filed, and the case is heard *on bill and answer*, without further evidence, see note (*b*), p. 466, *post*.

Hearing on bill and answer where replication is not filed.

Rule 2. Subpœna to rejoin abolished.

2. No *subpœna* to rejoin shall hereafter be issued; and only one replication shall be filed in each cause, unless the Court shall otherwise direct (*b*), and the replication shall be in the form set forth at the end of this order, or as near thereto as circumstances admit and require; and upon the filing of such replication the cause shall be deemed to be completely at issue (*c*); and each defendant may, without any rule or order, proceed to verify his case by evidence (*d*); and the plaintiff may in like manner proceed to verify his case by evidence (*d*) as soon as notice of the replication being filed has been duly served on all the defendants (*e*) who have filed an answer or plea, or against whom a traversing note has been filed, or who have not been required to answer and have not answered the bill (8th May, 1845; Ord. 93) (*d*).

One replication only to be filed.

Issue joined by filing replication.

Replications against several defendants.

(*b*) The application is not granted of course, nor, it seems, except in cases of necessity (*Stinton* v. *Taylor*, 4 Hare, 608). But it has been held that when some of the defendants answer after replication has been filed, the plaintiff should move for leave to file a further replication (*Rogers* v. *Hooper*, 2 Drew. 97.

In cases of revivor and abatement.

As to filing replication after revivor, see *Deeks* v. *Stanhope*, 2 W. R. 651; *Stanton* v. *Perceval*, 5 H. L. Ca. 257.

Application for leave to withdraw replication.

(*c*) Applications for leave to withdraw replication cannot be made after witnesses have been examined (*Gascoigne* v. *Chandler*, 3 Swanst. 420; *Bousfield* v. *Mould*, 1 De G. & Sm. 347; and see *Horton* v. *Brocklehurst* (No. 1), 29 Beav. 503. The applications for that purpose may be made in chambers, p. 148, *ante*.

A supplemental answer may by consent be filed after the replication is filed without withdrawing it (*Parsons* v. *Hardy*, 21 L. J. Ch. 400).

(*d*) As to the time for closing evidence, and applications to enlarge such time, see note (*k*), p. 191, *ante*.

Service of replication, out of jurisdiction, substituted.

(*e*) Where the defendant resides out of the jurisdiction, he may be served with notice of replication if his residence is known; see as to service out of the jurisdiction, *ante*, p. 425, note (*q*). And if his residence is not known, substituted service is permitted, *ante*, p. 420, note (*c*), thus in *Rooper* v. *Harrison*, 2 W. R. 510, an appearance had been entered for a defendant resident abroad, and interrogatories had been filed, which he was required to answer; but before he was served with them, they were amended by striking out the part which referred to him, and the Court directed a general replication to be filed, and that service of notice of filing the replication on the defendant within one week should be good service; and see *Wilkins* v. *Hogg*, 4 L. T. N. S. 12; *Butler* v. *Matthews*, 19 Beav. 549; and Ord. XXII. 1, *post*.

The notice must in ordinary cases be served on the day of filing (Ord. III. 9, *ante*, p. 389; but see note (*n*) thereto).

ORDER XVII. Replication and Joining Issue.

Form of Replication.

"Between A. B. . . . Plaintiff,

"and

"C. D., E. F., G. H., &c. . Defendants.

"The plaintiff in this cause hereby joins issue with the defendant C. D." [*all the defendants who have answered or pleaded, or against whom a traversing note has been filed, or who have not been required to answer and have not answered the bill*], "and will hear the cause on bill and answer against the defendant E. F." [*all the defendants against whom the cause is to be heard on bill and answer*], "and on the order to take the bill as confessed against the defendant G. H." [*as the case may be.*]

ORDER XVIII.

ORDER XVIII. Affidavits.

AFFIDAVITS (*a*).

1. All affidavits shall be taken and expressed in the first person of the deponent (8th May, 1845; Ord. 126) (*b*).

Rule 1. To be expressed in the first person.

(*a*) As to the Commissioners for administering oaths, see p. 230; and as to swearing affidavits abroad, see p. 180, *ante:* Daniell, 825; Seton, 20. The Registrars of the Land Registry Office may administer oaths under the Land Transfer Act, p. 334, *ante*, and the Clerks of Records and Writs, or of Inrolments, may administer them generally as occasion requires, p. 380, *ante*.

As to cross-examination upon affidavits, see note (*u*), p. 193, *ante*.

The word affidavit includes an affirmation and attestation upon honour (Prel. Ord. 10 (6).

Affidavits are to be printed, Ord. 16 May, 1862, *post*. Ord. 16 May, 1862.

An affidavit, if made in a suit, must be correctly entitled in the suit (*May* v. *Prinsep*, 11 Jur. 1032; *Salomon* v. *Stalman*, 4 Beav. 243, where a misnomer of the defendant in an affidavit of service was held a ground for discharging with costs the order obtained on the motion; but see *Hawes* v. *Bamford*, 9 Sim. 653; and *Pearson* v. *Wilcox*, 10 Hare, App. xxxv., where affidavits erroneously entitled were allowed to be taken off the file and re-sworn without a fresh stamp; and *Fisher* v. *Coffey*, 1 Jur. N. S. 956, where the name of one of the defendants having been omitted in the title, the Court, on proof that no suit such as that described in the title existed, gave leave to file the affidavit. See as to correcting errors in title, &c., of answer, note (*b*), p. 451, *ante*. Title of affidavit. Correction of errors in title, &c.

See further, as to the title of affidavits, *Re Harris*, 7 Jur. N. S. 166; *Re Barnes*, 5 L. T. N. S. 587.

If made on a petition under an Act of Parliament (*ex. gr.* the Trustee Act), they must be entitled in the Act (*Mackenzie* v. *Mackenzie*, 5 De G. & S. 338). But affidavits filed under a petition, the heading of which has been altered, need not be re-sworn (*Re Varteg Iron Works Wesleyan Chapel*, 10 Hare, App. xxxvii.); but may be made evidence in the petition under the new title by a short affidavit referring to them (*ibid.*).

ORDER XVIII. Affidavits.

Affidavits filed in a cause may be used in support of a petition in the cause, *Jones* v. *Turnbull*, 22 L. J. Ch. 1055; or, by leave of the Court, of a petition in a matter, *Re Pickance*, 10 Hare, App. xxxv.; and as to using, in a supplemental suit, affidavits filed in the original suit, see *Blackmore* v. *Glamorganshire Canal Company*, 5 Russ. 151; usually notice is required.

Affidavits made evidence in another matter.

As to a deponent's description of himself in his affidavit, see *Boddington* v. *Woodley*, 12 L. J. Ch. 15.

An affidavit containing scandalous and irrelevant matter may be ordered to be taken off the file (*Goddard* v. *Parr*, 3 W. R. 633; *Kernick* v. *Kernick*, 12 W. R. 335; and as to costs of affidavits, and of impertinent matter therein, see Ord. XL. 32, *post*, and notes thereto).

Form of affidavit.

(*b*) Every affidavit is to be divided into paragraphs, p. 190, *ante*. There is to be a memorandum stating by whom it is filed, Ord. 5 Feb. 1861, r. 18, and each statement is to show the means of knowledge, *ibid.* r. 23; as to erasures, see Ord. I. 36, p. 378, *ante*, and note. Documents referred to, if not set out, must be made exhibits, *Hewetson* v. *Todhunter*, 2 Sm. & G. App. ii.; *Re Field*, 11 W. R. 297; see Tripp, 99; Daniell, 828.

Irregular affidavits, when admitted.

Affidavits sworn in America in the third person were received as evidence in *Re Husband*, 12 L. T. N. S. 303; *Dryden* v. *Frost*, 8 Sim. 380; and trifling irregularities have been overlooked, see *Gates* v. *Buckland*, 13 W. R. 67; *Mick* v. *Ward*, 10 Hare, App. i.

When not admitted.

But the signature of the party cannot be dispensed with, *Anderson* v. *Stather*, 9 Jur. 1085; (as to marksmen, see —— v. *Christopher*, 11 Sim. 409); nor the words "make oath," *Phillips* v. *Prentice*, 2 Hare, 542; *Re Newton*, 2 D. F. J. 3.

Rule 2. Costs of affidavits not so expressed to be disallowed.

2. Any solicitor, party, or person filing an affidavit not taken and expressed in the first person of the deponent shall not be allowed the costs of preparing and filing such affidavit in any taxation of costs (8th May, 1845; Ord. 128) (*c*).

(*c*) See as to the form of affidavits, note (*b*), *supra*.

Rule 5. Affidavits to be filed in Record and Writs Office.

5. Before any affidavit is exhibited in court or otherwise produced for the purpose of grounding any order, writ, process, or proceeding thereon, such affidavit shall be filed in the office of the Clerks of Records and Writs (*d*). And no order grounded upon an affidavit shall be drawn up unless the affidavit be first so filed, and an office copy thereof be produced (15th Nov. 1660) (*e*).

Time for swearing and filing affidavits.

(1) Not before bill filed or petition presented.

(*d*) Generally no affidavit to be used at the hearing, even of a suit for an injunction, can be sworn *before* bill filed, *Francome* v. *Francome*, 13 W. R. 355; *Fennel* v. *Brown*, 18 Jur. 1051; except where, by the rules of the Court, or by statute, a special affidavit is required to be filed with the bill (*e.g.*, in suits to obtain the benefit of lost instruments, Daniell, 358; or formerly on motion for the common injunction, *ante*, p. 221); *Walker* v. *Fletcher*, 1 Ph. 115.

So in general affidavits to be used in support of a petition should be sworn after it is presented, *Re Western Benefit Building Society*, 33 Beav. 368; but where the petition was for payment of money out of Court, an affidavit sworn before the petition was presented, but after payment of the money in, was received, *Re Varley*, 14 W. R.

(2) Not *after* time fixed by General Orders.

Affidavits to be used in a suit cannot generally be filed *after* eight weeks from the time when issue is joined, see Ord. 5 Feb. 1862, r. 5, or where notice

of motion for decree is given, after the times specified by Ord. XXXIII. 5, 6 ; but the time may be enlarged in proper cases, see note (*k*) p. 191, *ante*. ORDER XVIII. Affidavits.

Affidavits to be used on motions or petitions may be filed up to the last moment before the hearing, *Munro* v. *Wivenhoe, &c. Railway Company*, 13 W. R. 880 ; *Ex parte Leicester*, 6 Ves. 429 ; *Jones* v. ——, 8 Ves. 46 ; *Electric Telegraph Company* v. *Nott*, 2 Coop. 67 ; where the hearing was postponed to give time to file them, see, however, *Clement* v. *Griffith*, Coop. 470. In a very special case affidavits filed after the motion was opened were admitted, *East Lancashire Railway Company* v. *Hattersley*, 8 Hare, 87 ; and see *Smith* v. *Swansea Dock Company*, 9 Hare, App. xx., and where an affidavit was filed too late for the hearing of a petition, it has been admitted on appeal, *Re Gibraltar and Malta Banking Company*, 13 L. T. N. S. 263. Time for filing affidavits on interlocutory applications.

Affidavits of service must be filed at latest before the rising of the court on the day on which the application is made, *Lord Miltoun* v. *Stewart*, 8 Sim. 34. Affidavits of service.

(*e*) In vacation office copies have been dispensed with, *Attorney-General* v. *Lewis*, 8 Beav. 179 ; but the rule is strictly adhered to at other times, *Jackson* v. *Cassidy*, 10 Sim. 236 ; *Elsey* v. *Adams*, 4 Giff. 398, where an injunction was dissolved with costs because there was no office copy of the affidavit in court when the motion was made.

As to office copies, see Daniell, 832 ; Ord. XXXVI. 1, *post*.

ORDER XIX.

ORDER XIX. Evidence generally.

EVIDENCE GENERALLY.

1. When the defendant has answered, the plaintiff shall carefully consider the answer, and if he finds that upon the answer alone, without further proof, there is sufficient ground for a final order or decree, he shall proceed upon the answer without entering into evidence. Or if it is needful to prove a particular point, he shall not enter into evidence as to other points that are not necessary to be proved. In the first case, if he enters into evidence at all, and in the second case, if he enters into evidence as to such other points, he will render himself liable to pay the costs thereof (22nd May, 1661; Sanders, 299) (*a*). Rule 1. Plaintiff's duties as to entering into evidence. Costs.

(*a*) For the cases on taking evidence in a cause where notice of motion for decree is given, see note to 15 & 16 Vict. c. 86, s. 15, p. 170, *ante*, and where issue is joined, see note (*u*) to the 30th section of the same Act, p. 184, *ante*, and as to cross-examination before the examiner, see notes on pp. 185—9, *ante*, and as to the time for closing evidence, see p. 191, *ante*. Evidence and cross-examination.

2. Where a cause is heard upon bill and answer, the answer must be admitted to be true in all points, and no other evidence shall be admitted, unless it be matter of Rule 2. Hearing on bill and answer.

ORDER XIX. Evidence Generally.

record to which the answer refers, and which is proveable by the record (29th Jan., 1618-19; Ord. 64. 22nd May, 1661; Sanders, 300) (*b*).

Proving exhibits at hearing on bill and answer.

(*b*) It seems to be now settled that, notwithstanding this rule, an exhibit may be proved *at the hearing* upon bill and answer (*Chalk* v. *Raine*, 13 Jur. 481, following *Rowland* v. *Sturgis*, 2 Hare, 520; *Neville* v. *Fitzgerald*, 2 Dru. & War. 530, and overruling *Jones* v. *Griffith*, 14 Sim. 262).

Vivâ voce, or by affidavit.

The 43rd Order of Aug. 1841, provides "That, in cases in which any exhibit may by the present practice of the Court be proved *vivâ voce* at the hearing of a cause, the same may be proved by the affidavit of the witness who would be competent to prove the same *vivâ voce* at the hearing" (Beav. Ord. Canc. 179). This Order is not expressly incorporated into the Consolidated Orders; but it is apprehended that, under the combined operation of rule 3 of this Order, and rule 5 of the Preliminary Order, the practice established by it will be preserved unaltered.

Rule 3.

[The 3rd rule of this Order (which abrogated sect. 30 of the Chancery Amendment Act, 1852 (*ante*, p. 184), as to evidence in a cause where issue is joined), is now abrogated in its turn by the new rules of 5th Feb. 1861, see note (*t*), p. 184, *ante*.]

Rule 4. Decrees in other courts may be read without order; secus as to depositions.

4. Decrees in other courts may be read upon the hearing, without an order. But no depositions taken in any other court shall be read, unless by order (29th Jan. 1618-19; Ord. 71) (*c*).

Reading decrees and *evidence* in other causes.

(*c*) The order is made as of course, saving just exceptions, see Daniell, 807, *et seqq.* The true test seems to be whether the first suit raised the same issue, and was *virtually* between the same parties (*i.e.* between persons representing the same interests) as the first (*Lawrence* v *Maule*, 4 Drew. 472; *Borough* v. *Whichcote*, 3 Bro. P. C. 595; *Coke* v. *Fountain*, 1 Vern. 413; *Eade* v. *Lingood*, 1 Atk. 204; *Humphreys* v. *Pensam*, 1 M. & C. 580; *Mackworth* v. *Penrose*, 1 Dick. 50).

If there has been opportunity to cross-examine.

The fact that the plaintiff in the second suit was only a co-defendant in the first suit will not prevent the Court from allowing the depositions of the witnesses in the first suit to be read if the party against whom they are to be read had an *opportunity of cross-examining the witnesses* (*Nevil* v. *Johnson*, 2 Vern. 447, and see *Poulterers' Company* v. *Askew*, 2 Ves. sen. 89, 90), and a plaintiff was allowed, seven months after he had given notice of motion for decree, to use the examination of the defendant taken in another cause, *Watson* v. *Cleaver*, 20 Beav. 137.

But where there has been no opportunity to cross-examine affidavits, they cannot be made evidence in another suit, *Williams* v. *Williams*, 12 W. R. 663; *Moore* v. *Harper*, 15 W. R. 306; and see note (*w*), p. 194, *ante*.

Order to read evidence taken under winding up; in bankruptcy; *not* evidence taken in county Palatine.

An order was made to read in a suit evidence taken under a winding-up order to which the parties to the suit were privy, *Ernest* v. *Weiss*, 1 N. R. 6; and depositions in bankruptcy, *Lake* v. *Peisley*, 1 L. R. Eq. 173; 35 Beav. 125.

But an order of course to read in a suit in Chancery copies of a bill, order, decree, or affidavits, in a suit in the Court of the County Palatine, alleged to have been between the same parties, and directed to the same issue, was discharged as irregular, *Stephenson* v. *Biney*, 2 L. R. Eq. 303; such depositions must be introduced as evidence in the ordinary course (*ibid.*).

Though witnesses are not dead.

The order may be made though the witnesses whose evidence it is proposed to use are not dead, *City of London* v. *Perkins*, 3 Brow. Parl. Ca. 602; but see *Carrington* v. *Carnock*, 2 Sim. 567.

5. Where either party, plaintiff or defendant, obtains an order to use depositions of witnesses taken in another cause, the opposite party may likewise use the same without motion, unless upon special reason, shown to the Court by the party obtaining such order, the opposite party be prohibited by the same order from so doing (22nd May, 1661; Sanders, 304).

Rule 5. Order to use depositions in another cause, to be available by opposite party.

*6. Where a defendant in equity files a cross bill for discovery only against the plaintiff in equity, or exhibits interrogatories for his examination (*d*), the answer to such cross bill or interrogatories may be read and used by the party filing such cross bill or exhibiting such interrogatories in the same manner, and under the same restrictions, as the answer to a bill praying relief may be read and used (26th Aug. 1841; Ord. 42).

Rule *6. Answer to cross bill for discovery, or to cross interrogatories treated as answer to bill for relief.

(*d*) The words "or exhibit interrogatories for his examination" are new, see 15 & 16 Vict. c. 86, s. 19, *ante*, p. 177.

[The 7th rule of this Order, as to examination of witnesses before the examiner is abrogated by r. 2 of Ord. 5th Feb. 1861, *post*, and see now notes pp. 185—9, *ante*, as to cross-examination in a cause where notice of motion of decree is given, and as to cross-examination (before the Court) in a cause where issue is joined, see note (*u*), p. 185, *ante*, and Ord. 5th Feb. 1861, *post*.]

7th rule as to *cross-examination* abrogated.

8. The re-examination of a witness shall immediately follow his cross-examination, and shall not be delayed to a future period (7th Aug. 1852; 1st Set. Ord. 35) (*e*).

Rule 8. Re-examination of witness.

(*e*) See *ante*, pp. 170, 184.

[The 9th rule providing for the attendance of witnesses for cross-examination, is abrogated by r. 2 of Ord. 5th Feb., 1861; and see now rule 19 of that order, *post*].

Rule 9 abrogated.

10. The above Rules with reference to the examination, cross-examination, and re-examination of witnesses, shall extend and be applicable to evidence taken in any cause subsequently to the hearing thereof (7th Aug. 1852; 1 Set. Ord. 38) (*f*).

Rule 10. Evidence taken after the hearing.

(*f*) See the next note.

11. The practice of the Court with respect to evidence before the hearing, when applied to evidence to be taken before an examiner in any cause subsequently to the hearing, shall be subject to any special directions which

Rule 11. Special directions as to evidence after the hearing.

ORDER XIX. Evidence Generally.

may be given in any particular case (16th Oct. 1852; Ord. 25) (*g*).

(*g*) See Ord. XXXV. 29, *post*, and note (*n*), p. 152, *ante*.

Rule 12. No affidavit or deposition filed or made before issue joined to be used without notice.

12. No affidavit or deposition filed or made before issue joined in any cause shall, without special leave of the Court, be received at the hearing thereof, unless within one month after issue joined, or within such longer time as may be allowed by special leave of the Court (*h*), notice in writing shall have been given by the party intending to use the same, to the opposite party, of his intention in that behalf (13th Jan. 1855; Ord. 6).

(*h*) As to applications to enlarge time, see note (*k*), p. 191, *ante*.

Rule 13. Time for closing evidence in causes. Time for cross-examination in causes.

[The 13th rule (abrogated by Ord. 5th Feb., 1861, r. 2, provided: (1), for the time for closing the evidence in causes where issue is joined, as to which see now Ord. 5th Feb., 1861, r. 5, and note (*i*), p. 191, *ante*. (2) For the time during which such evidence should be open to cross-examination. See now the same order, r. 19, and note (*u*), p. 185, *ante*. As to the time for closing evidence where notice of motion for a decree is given, see Ord. XXXIII. 4, *post*.]

Rule 14. Oaths.

14. Oaths shall be administered in a reverent manner (10th April, 1676) (*i*).

(*i*) As to swearing affidavits, &c., see note (*a*), p. 463, *ante*.

ORDER XX. Preliminary Accounts and Inquiries.

ORDER XX.

PRELIMINARY ACCOUNTS AND INQUIRIES.

WHERE it appears that certain preliminary accounts and inquiries (*a*) must be taken and made before the rights and interests of the parties to the cause can be ascertained, or the questions therein arising can be determined, the plaintiff shall be at liberty, at any time (*b*) after the defendants shall have appeared to the bill, to move (*c*) the Court on notice, that such inquiries and accounts shall be taken and made (*d*); and an order (*e*) directing such inquiries and accounts shall thereupon be made, without prejudice to any question in the cause, if it shall appear to the Court that the same will be beneficial to such (if

any) parties to the cause as may not be competent to consent thereto, and that the same is consented to by such (if any) of the defendants as being competent to consent have not put in their answer to the bill, and that the same is consented to by, or is proper to be made upon the statements contained in the answers of such (if any) of the defendants as have answered the bill (*f*) (9th May, 1839; Ord. 5).

(*a*) Where preliminary inquiries are directed, but in consequence of some irregularity the bill is afterwards dismissed against one defendant, the preliminary inquiries may, under special circumstances, be prosecuted against the other defendants, the plaintiff waiving all relief against the party dismissed (*Chaffers* v. *Baker*, 5 W. R. 515). See note (*d*) *infra*.

Preliminary inquiries prosecuted against some defendants only.

(*b*) They may be ordered though the cause is set down (*Strother* v. *Dutton*, 10 Sim. 288).

Time for ordering.

(*c*) In *Hicks* v. *Shells*, 4 Jur. 858, Lord Langdale, M. R., made the order on *petition*. See, too, *Neate* v. *Pink*, 15 Sim. 450.

On petition.

(*d*) The Court will not act under this rule where some of the defendants are out of the jurisdiction (*Derbishire* v. *Home*, 14 Jur. 969; see *Barrett* v. *Buck*, 2 Hare, 520); or where some of the defendants object that persons not parties are interested (*ibid.*; and see *Logan* v. *Baines*, 10 Sim. 604); for the inquiry must be binding on all parties (*Meinertzhagen* v. *Davis*, 10 Sim. 289). Nor, it seems, will the rule be acted upon where the plaintiff's title (*Wilson* v. *Applegarth*, 10 Sim. 657; *Kinshela* v. *Lee*, 7 Beav. 300), or the substantial equity of the case (*Belcher* v. *Whitemore*, 7 Beav. 245), is denied by the answer. See, too, *Wallis* v. *Sarel*, 8 Jur. 640; and *Reed* v. *Don Pedro Mining Company*, 11 W. R. 935, where the Lords Justices refused to direct a reference as to title, one of the defences set up by the answer being that the title was not made out in time.

Court refuses to act on this rule, *unless all parties will be bound* by the inquiries.

In *Foxlowe* v. *Amcoats*, 4 Jur. 1053, a suit for specific performance, the Court on motion under this rule referred it to the Master to inquire whether the plaintiff had shown a good title, and when first, without prejudice to the question of specific performance (see now Ord. XXXV. 61). And in general the inquiries must be such as would have been directed at the hearing (*Meinertzhagen* v. *Davis*, 10 Sim. 289); and they will be regulated by the nature of the suit (*Collinson* v. *Ballard*, 2 Hare, 119); and they must not be such as would involve the decision of the questions at issue in the cause (*Curd* v. *Curd*, 2 Hare, 116; *Breeze* v. *English*, *id.* 118; *Lee* v. *Shaw*, 10 Sim. 369; *Frost* v. *Hamilton*, 4 Beav. 33).

What inquiries will be directed under this Order.

As to the evidence which will justify the Court in directing these inquiries generally, see *Miller* v. *Priddon*, 1 M. & G. 687; *Skarf* v. *Soulby*, 1 M. & G. 364; *Jenkyn* v. *Vaughan*, 4 W. R. 214.

Evidence.

(*e*) The order when made has not the effect of a decree (*Teague* v. *Richards*, 11 Sim. 46). Thus, it will not prevent a creditor from suing at law (*ibid.*).

Order not final.

(*f*) See note (*d*). In one case the Court granted a preliminary inquiry in a suit with a view to granting the prayer of a petition presented by persons not parties (*Neate* v. *Pink*, 15 Sim. 450). In another case a defendant (the plaintiff having died in the interval), was allowed to prosecute the inquiries (*Upjohn* v. *Upjohn*, 4 Beav. 246).

At whose instance granted.

Order XXI. Setting Down and Hearing.

ORDER XXI.

Setting Down and Hearing.

Rule 1. Time for setting down, and serving subpœna to hear judgment.

1. Within four weeks after the evidence has been closed the plaintiff shall set down his cause and obtain and serve a *subpœna* to hear judgment (*a*). If he does not, any defendant, after the expiration of such four weeks, may either move to dismiss the bill for want of prosecution, or may set the cause down at his own request, and may obtain a *subpœna* to hear judgment, and serve the same on the plaintiff (*b*) (8th May, 1845; Ord. 16, Art. 45, and Ord. 116).

When four weeks run.

(*a*) The time for closing the evidence means the time limited for the examination in chief, consequently the four weeks run from the termination of the eight weeks mentioned in rule 5 of Ord. 5th Feb. 1861, *Dowson* v. *Solomon*, 4 Drew. 642; *Hart* v. *Roberts*, 32 Beav. 231, where it was held by the Master of the Rolls that at the end of the four weeks the defendant might, if the cause were not set down, move to dismiss for want of prosecution. In *Jenkyn* v. *Vaughan*, 3 W. R. 151, V.-C. Kindersley refused to dismiss a bill though the four weeks had elapsed, on the ground apparently (see remarks in *Dowson* v. *Solomon*, l. c.), that the time for cross-examination had not elapsed.

Further time to set down the cause was allowed in *Southampton, &c. Steamboat Company* v. *Rawlins*, 13 W. R. 512.

Subpœna to hear judgment where bill amended, &c.

As to serving subpœna to hear judgment when the bill has been amended or the suit revived, see *Davis* v. *Prout*, 7 Beav. 256; *Bray* v. *Woodran*, 6 Madd. 72.

For form of subpœna, see Appendix, p. vi. *post*.

Where unconditional order for enlarging time has been obtained.

If the plaintiff has obtained an unconditional order for enlarging the time for closing the evidence, the defendant cannot set down the cause or obtain the subpœna (*Langley* v. *Fisher*, 5 Beav. 592); and where he had done so the cause was struck out of the paper and the subpœna quashed (*ibid.*).

Defendant bound to serve plaintiff only.

(*b*) The defendant who sets the cause down is only bound to serve the *plaintiff* (*Smith* v. *Wells*, 6 Madd. 193; *Clarke* v. *Dunn and Phelps*, 5 Madd. 474). It is the duty of the plaintiff to serve the other defendants (*ibid.*).

See further, *Rigg* v. *Wall*, 3 M. & Cr. 505.

Rule 2. Causes to be set down on certificate of proper officer.

2. All causes required to be heard shall be set down for hearing by the registrars, upon production to them of the certificate of the proper officer that the same are in a fit state to be set down for hearing (23rd Feb. 1850) (*c*).

Setting down cause as short. Minutes agreed on.

(*c*) As to setting down causes, see Appendix, p. lxxxi. *post*, and as to marking them as short causes, Appendix, p. lxxxii. *post*. The Court by consent allowed a cause to be heard, when there were interrogatories unanswered on the file, minutes of decree having in the meantime been agreed upon, and the parties having agreed to dispense with the answer (*Elston* v. *Elston*, 24 L. J. Ch. 408).

Rule 3. Subpœna to

3. No *subpœna* to hear judgment shall be sealed, unless

the Clerk of Records and Writs who seals the same has a note from the registrar of the day on which the same is to be made returnable. And the registrar shall not give any such note until the cause is set down for hearing (18th Feb. 1621-22. 28th May, 1623. 30th June, 1626. Hil. Term, 1646-47; Ord. 2. 8th May, 1673; Ord. 8. 25th June, 1658).

Hear judgment not to be sealed without note from registrar.

4. Causes may be set down for hearing, and the *subpœnas* to hear judgment served and returnable on any day, as well out of term as in term (23rd Nov. 1831; Ord. 82).

Rule 4. Causes may be set down and subpœnas served out of term.

5. A *subpœna* to hear judgment shall not be returnable at any time less than one month from the *teste* of the writ; and it shall be served at least ten days before the return thereof (8th May, 1845; Ord. 16, Art. 46) (*d*).

Rule 5. Subpœna when returnable and to be served.

(*d*) See, as to advertising the subpœna to hear judgment, notes to Ord. XXII. 4, p. 478, *post*; and as to waiver of irregularity in the writ, *Carvick* v. *Young*, Jac. 524; and for form of the subpœna, see Appendix, p. vi. *post*.

Advertising subpœna.

6. Foreclosure causes, when ready for hearing, may be ordered to be advanced for hearing, under the same circumstances and subject to the same rules as other causes may be ordered to be so advanced (9th May, 1839: Ord. 4) (*e*).

Rule 6. Advancement of foreclosure causes.

(*e*) The costs of a successful application under this rule were directed to be costs in the cause (*Carthew* v. *Barclay*, 10 Sim. 273; but see *Browne* v. *Lockhart*, 10 Sim. 420). The application should be on notice (*Powell* v. *Calloway*, 4 Jur. 859). The application will not be granted unless the defendant consents, *semble* (*Lewin* v. *Moline*, 1 Beav. 99; and see *Mountford* v. *Cooper*, 1 Keen, 464; and *Rashleigh* v. *Dayman*, 2 Madd. 147, there cited).

Costs of application. Notice of application.

7. Where any cause becomes abated or is compromised after the same is set down to be heard, the solicitor for the plaintiff shall certify the fact (*f*), as the case may be, to the registrar, who shall cause an entry thereof to be made in the Cause-book opposite to the name of such cause (3rd April, 1828; Ord. 39).

Rule 7. Abatement or compromise after setting down cause to be certified.

(*f*) If this be not done, the defendant will be entitled to the costs of the day (*Saner* v. *Deavin*, 14 Beav. 646).

Costs of the day.

8. Where any cause shall have been standing for one year in the Cause-book, marked as "abated," or standing over generally, such cause shall, at the expiration of the

Rule 8. Causes abated or standing over for one

ORDER XXI. Setting Down and Hearing.

year, to be struck out. Retaining cause till infant of age.

year, be struck out of the Cause-book (*g*) (22nd Aug. 1859; Ord. 19).

(*g*) But where infants who had nearly attained twenty-one were interested in the subject-matter of a suit set down for hearing, the Court by consent ordered the cause to be retained in the Registrar's book till they attained twenty-one (*Brooke* v. *Todd*, 6 Jur. N. S. 664).

Rule 9. Causes on further directions and on equity reserved. Pleas, demurrers, exceptions, to Masters' Reports, how set down.

9. All causes for further directions, or on equity reserved after a trial at law shall have been had in pursuance of a decree or order pronounced by the Lord Chancellor, the Lords Justices, the Master of the Rolls, or one of the Vice-Chancellors, and all pleas, demurrers, and exceptions to Masters' Reports required to be heard before the Lord Chancellor, the Lords Justices, the Master of the Rolls, or one of the Vice-Chancellors, shall be set down by the registrars for hearing, on orders drawn up by them upon petition to the Lord Chancellor to be left with the registrar, or on orders drawn up by one of the secretaries at the Rolls upon petition of course to the Master of the Rolls, as the case may be (23rd Feb. 1850).

Rule 10. Causes how set down; causes on further consideration.

10. When any cause shall, at the original or any subsequent hearing thereof, have been adjourned for further consideration, such cause may, after the expiration of eight days and within fourteen days from the filing of the certificate of the chief clerk of the judge to whose court the cause is attached, be set down by the registrar in the Cause-book for further consideration, on the written request of the solicitor for the plaintiff or party having the conduct of the cause; and after the expiration of such fourteen days the cause may be set down by the registrar on the written request of the solicitor (*h*) for the plaintiff or for any other party; and the request to set down the cause may be in the form or to the effect firstly set forth at the end of this Rule; but the cause, when so set down, shall not be put into the paper for further consideration until after the expiration of ten days from the day on which the same was so set down, and shall be marked in the Cause-book accordingly. And notice thereof shall be given to the other parties in the cause at least six days before the day for which the same may be so marked for

further consideration; and such notice may be in the form or to the effect secondly set forth at the end of this Rule (4th March, 1853).

(*h*) A cause may be set down a second time for further consideration and to administer purchase-monies on the chief clerk's certificate that a sale of part of the property has taken place since the first certificate (per V.-C. Stuart, January, 1860). Further consideration.

See as to marking causes "short" 10th Regist. Regul. March, 1860, Appendix, p. lxxxii. *post.* Cause marked short.

Form of Request.

"IN CHANCERY.

"A. *v.* B.

"I request that this cause, the further consideration whereof was adjourned by the Order of the day of , may be set down for further consideration before His Honour the

"Dated, &c. "C.D.

"Solicitor for "

Form of Notice.

"IN CHANCERY.

"A. *v.* B.

"Take notice that this cause, the further consideration whereof was adjourned by the Order of the day of , was, on the day of set down for further consideration before His Honour the for the day of

"Dated, &c. "C.D."

"Solicitor for "

"To Mr.

"Solicitor for "

11. The solicitors for the several parties in all causes and matters shall attend in court when such causes and matters are appointed to be heard and during the hearing thereof (18th Jan. 1815). Rule 11. Solicitor to attend at hearing.

12. Where, upon the hearing of any cause or other matter, it appears that the same cannot conveniently proceed, by reason of the solicitor for any party having neglected to attend personally or by some proper person Rule 12. When cause cannot proceed through neglect or omission of solicitor.

ORDER XXI. Setting Down and Hearing.

on his behalf, or having omitted to deliver any paper necessary for the use of the Court, and which according to its practice ought to have been delivered, such solicitor shall personally pay to all or any of the parties such costs as the Court shall think fit to award (3rd April, 1828; Ord. 36) (*i*).

Costs.

Solicitor when ordered to pay costs personally.

(*i*) See *Cook* v. *Broomhead*, 16 Ves. 133, where a solicitor having undertaken to appear for a defendant at the hearing was ordered to pay all the costs occasioned by his neglect to do so; and *Courtney* v. *Stock*, 2 Dr. & War. 251.

Rule 13. No pleas, &c., to stand over to indefinite period.

13. No pleas, demurrers, exceptions, causes, further directions, further considerations, rehearings or appeals shall be allowed to stand over to an indefinite period (29th Jan., 1835).

ORDER XXII. Taking Bills pro Confesso.

ORDER XXII.

Taking Bills pro Confesso (*a*).

1. *Preliminary Proceedings.*

Rule 1. Notice of motion that bill be taken pro confesso after attachment for want of answer, when to be served.

1. Upon the execution of an attachment for want of answer (*b*) against any defendant (*c*) or at any time within three weeks afterwards, the plaintiff may cause such defendant to be served with a notice of motion to be made on some day not less than three weeks (*d*) after the day of such service, that the bill may be taken *pro confesso* against such defendant; and thereupon, unless such defendant has in the meantime put in his answer to the bill, or obtained further time to answer the same, the Court, if it so think fit, may order the bill to be taken *pro confesso* against such defendant, either immediately, or at such time and upon such terms and subject to such conditions as under the circumstances of the case the Court shall think proper (8th May, 1845; Ord. 76, and Ord. 16, Art. 49)(*e*).

Process by attachment: Rules 1 and 2. Without attachment:

(*a*) Rules 1 and 2 of this order relate to the old practice of taking bills *pro confesso*, after first attaching, or attempting to attach, the defendant. See note (*a*), pp. 433—434, *ante*.

But that practice is now superseded by the more convenient one of joining issue by filing a traversing note (p. 438, *ante*), or of proceeding to take the bill *pro confesso*, without any process to enforce the answer. See note (*f*), *infra*.

For this purpose it is necessary that the defendant be served with the bill

personally, or by substituted service (Ord. X. 7, p. 423, *ante*), and that interrogatories should have been *filed* (see next note): then if the defendant appears, but refuses to answer, the plaintiff may proceed under rules 2 and 3 of this order; and if he neither appears nor answers, under rules 2 and 4.

(*b*) See *ante*, p. 433.

Rules 3 & 4. Process:

If no answer has been required, and the defendant puts in no answer, but absconds, the proper course is not to proceed under this order, but to file replication, as if the defendant had traversed the case made by the bill, see Ord. XVII. 1 (p. 461, *ante*), and the replication may be advertised, note (*e*), p. 462, *ante*; and as to taking bills of revivor, or supplement *pro confesso*, see next note.

where no answer is required;

Where an answer is required, an insufficient answer is considered as no answer, and a bill can be taken *pro confesso* against a defendant where an answer is on the file, if such answer be insufficient (*King* v. *Bryant*, 6 L. J. Ch. (N. S.), 151; but see *Hawkins* v. *Crook*, 2 P. Wms. 556).

where answer is insufficient.

In order to take the bill *pro confesso* for want of answer it has been considered that interrogatories must have been *filed*, *Butler* v. *Matthews*, 19 Beav. 449, followed in *Wilkins* v. *Hogg*, 4 L. T. N. S. 12. And where leave had been given to serve a bill and interrogatories on a defendant abroad, and subsequently the plaintiff moved to take the bill *pro confesso*, the registrar objected that the interrogatories were not actually filed till after the order for service; but as the defendant was not misled, the objection was held immaterial, *Harrison* v. *Bailey*, 2 W. N. 94.

Interrogatories must be *filed*,

Where the defendant absconds and cannot be attached, so that the case comes within rules 2 and 3, though the interrogatories must have been filed, service or advertisement of them may be dispensed with, *Butler* v. *Matthews*, 19 Beav. 549; *Wilkins* v. *Hogg*, 9 W. R. 688; *Anthony* v. *Cooper*, 34 Beav. 77; *Darlow* v. *Simcock*, 14 W. R. 383. See note (*a*), p. 481, *post*, as to dispensing with service of decree.

but need not be served.

(*c*) Where the plaintiff has a right to take a bill *pro confesso* against the husband, he has also a right to take it *pro confesso* against the wife, if both be made defendants, and there is no order for the wife to answer separately (*Alexander* v. *Osborne*, 11 Jur. 444; and see *Gee* v. *Cottle*, 3 M. & Cr. 180; *Tooke* v. *Clark*, Dick. 350; and note (*b*) to Ord. XII. 2, *ante*, p. 435).

In cases of husband and wife.

As to taking a bill *pro confesso* against the Attorney-General, see *Peto* v. *Attorney-General*, 1 Y. & J. 509; against a corporation, *Brickwood* v. *Harvey*, 8 Sim. 201; against privileged persons, *Logan* v. *Grant*, 1 Madd. 626; *Jones* v. *Davis*, 17 Ves. 368; against a defendant under sentence for felony, *Rogers* v. *Kirkpatrick*, 3 Ves., jun. 573.

Taking bills pro confesso against particular defendants.

As to taking a bill of revivor *pro confesso*, see *Henderson* v. *Meggs*, 2 Bro. C. C. 127; *Anon.*, 3 Atk. 690; *Burnside* v. *Mayne*, 8 Ir. Eq. Rep. 97. When an original bill had been taken *pro confesso* against a defendant residing abroad, it was held unnecessary to go through the process of taking a supplemental bill against the same defendant *pro confesso* also, but after serving the latter bill on the defendant abroad, and entering an appearance for him, the Court gave leave to serve notice of replication abroad (*Heath* v. *Lewis*, *Stuart* v. *Sturges*, 2 W. R. 488).

In cases of revivor,

Where the cause is set down on further consideration, service of notice thereof on the absconding defendant is unnecessary, see *Godson* v. *Cook*, 7 Sim. 519 (*Eltoft* v. *Brown*, 2 Hare, 618; *Green* v. *Harrison*, 4 W. R. 696), see note (*c*), p. 197, *ante*.

further consideration, &c.

(*d*) The long vacation is reckoned in computing these three weeks, Ord. XXXVII. 13, and note.

(*e*) The first order is that the Clerk of Records and Writs, &c., attend with the record of the plaintiff's bill at the hearing of the cause on the day of , in order that the same may be taken *pro confesso* (*Brown* v. *Home*, 8 Beav. 607), unless the defendant should on or before, &c., show good cause to the contrary; and that the cause shall not be heard until, &c. (*Courage* v. *Wardell*, 4 Hare, 481; 9 Jur. 1055; where the defendant had appeared by his solicitor); and see *Collins* v. *Collyer*, 3 Beav. 600; (and 4 Beav. 103); decided on the 1 Wm. 4, c. 36, s. 15; but see *Woollams* v. *Baker*, 6 Sim. 316, and cases there cited; *Grover* v. *Baker, Sewing Machine Company* v. *Millard*, 8 Jur. N. S. 713.

Form of order where bill taken pro confesso.

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As to taking bills of revivor, or supplemental proceedings *pro confesso* at once, see note (*c*), *supra*.

Costs of motion.

The Court may under this rule order the costs of the motion to be paid by the defendant, though he puts in his answer before it is made (*Spooner* v. *Payne*, 2 De G. & Sm. 439). The order takes effect from the time when it is pronounced (*James* v. *Creswicke*, 7 Sim. 143, where the Court refused to discharge it, though the answer was filed before the rising of the Court on the day on which it was made).

Party interested allowed to intervene and answer.

Where there had been a decree in a creditor's suit for the administration of the testator's estate, and a bill was subsequently filed against the executrix which was about to be taken *pro confesso*, the Court gave the plaintiff in the first suit liberty to intervene in and defend the second upon payment of costs, and giving an indemnity (*Olding* v. *Poulter*, 23 Beav. 143).

A bill may be taken *pro confesso* in the vacation (*Clark* v. *Clark*, 1 Ph. 116).

Rule 2. Defendant not answering and not to be found, deemed to have absconded to avoid process, &c.

2. (*f*) Where any defendant, whether within or not within the jurisdiction of the Court, does not put in his answer (*g*) in due time after appearance entered by or for him, and the plaintiff is unable, with due diligence (*h*) to procure a writ of attachment or any subsequent process for want of answer to be executed against such defendant, by reason of his being out of the jurisdiction of the Court, or being concealed, or for any other cause, then such defendant shall, for the purpose of enabling the plaintiff to obtain an order to take the bill *pro confesso*, be deemed to have absconded to avoid or to have refused to obey the process of the Court (8th May, 1845; Ord. 77) (*i*).

Defendant may be *absconding defendant* though no attachment be issued.

(*f*) This rule like the first applies primarily to process for enforcing an answer, see note (*a*), *supra*; but it is *not necessary* in order to take a bill *pro confesso* against an absconding defendant, that an *attachment* should have been *actually issued*, *Butler* v. *Matthews*, 19 Beav. 549; see *Whitfield* v. *Lequetre*, 10 Jur. 533. And for cases in which a defendant is held to be absconding for the purpose of having the bill taken *pro confesso* against him, see *Hele* v. *Ogle*, 2 Hare, 623; *Zulueta* v. *Vinent*, 15 Beav. 272; *Graver* v. *Templer*, 9 Sim. 523; *Jarvis* v. *Shand*, 13 L. T. N. S. 403, and note (*m*), *infra*; but the Court has wide discretion as to whom it will consider an absconding defendant for this purpose, see note (*p*), *infra*.

Want of answer.

(*g*) Before the bill can be taken *pro confesso* for want of answer, interrogatories must have been *filed*; but need not *necessarily* be served or advertised, see note (*b*), *supra*.

(*h*) See *Yearsley* v. *Budgett*, 11 Beav. 144; *Wilkinson* v. *Turner*, 14 W. R. 813.

(*i*) See note (*f*), *supra*.

Rule 3. Where such defendant has appeared in person or by his solicitor,

3. Where any defendant who, under the 2nd Rule of this Order, may be deemed to have absconded to avoid or to have refused to obey the process of the Court, appears in person or by his own solicitor, the plaintiff may serve

upon such defendant or his solicitor a notice, that on a day in such notice named (being not less than fourteen (*k*) days after the service of such notice), the Court will be moved (*l*) that the bill may be taken *pro confesso* against such defendant; and the plaintiff must, upon the hearing of such motion, satisfy the Court (*m*) that such defendant ought, under the provisions of the 2nd Rule of this Order, to be deemed to have absconded to avoid or to have refused to obey the process of the Court; and the Court, if so satisfied, and if an answer has not been filed may, if it so think fit (*n*), order the bill to be taken *pro confesso* against such defendant, either immediately or at such time or upon such further notice (*o*) as under the circumstances of the case the Court may think proper (8th May, 1845; Ord. 78) (*p*).

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notice of motion to take bill pro confesso to be given.

(*k*) Short notice of motion was allowed in *Newton* v. *Carr*, 6 N. R. 347; *Wedderburn* v. *Thomas*, 10 Jur. N. S. 92. See, also, as to this motion note (*q*) to next section.

Motion against absconding defendant.

(*l*) See note (*q*) next section.

(*m*) The affidavit in support of the motion must show that "the plaintiff has made inquiries at places and of persons where there was reasonable probability that the defendant would be heard of" (*Anstey* v. *Hobson*, 2 W. R. 46; *Harrison* v. *Stewardson*, 2 Hare, 530). Thus, where the affidavit showed that the defendant was in Australia, and that communications had been unsuccessfully attempted to be made with him and through his wife, who was in England, and notice of the application had been served on the solicitor who had put in an appearance for him, this was held sufficient (*Robson* v. *Earl of Devon*, 2 W. R. 485). But a mere allegation that the plaintiff has used all possible diligence is not enough (*ibid.*). It is not necessary that an attachment should have been issued, see note (*f*), *supra*.

Affidavit must show that defendant is *absconding*.

(*n*) The words "if it so think fit" give the Court a wide discretion.

(*o*) The Court will not in general direct the bill to be taken *pro confesso* immediately, see note (*e*), *supra*.

Bill not taken pro confesso immediately.

(*p*) This order does not take away the right of proceeding under the 1 Wm. 4, c. 36, *Wilkin* v. *Nainsby*, 4 Hare, 476, see *ante*, p. 433.

1 Wm. 4, c. 36, how far superseded.

An order to take the bill *pro confesso* is gone, if an order be obtained to amend even a clerical error in the bill (*Weightman* v. *Powell*, 2 De G. & Sm. 570, see note (*j*), p. 411, *ante*. But see *Cheeseborough* v. *Wright*, 28 Beav. 173, where a plaintiff, after entering an appearance for a defendant, amended his bill, and it was held that a second appearance was unnecessary (see the case of *Nairne* v. *Featherstone*, cor. V.-C. Wood, there cited).

Effect of order to amend on order to take bill pro confesso.

*4. Where any defendant who, under the 2nd Rule of this Order, may be deemed to have absconded to avoid or to have refused to obey the process of the Court, has had an appearance entered for him under the 4th, 6th, or 7th Rule of Order X., and does not afterwards appear in person, or by his own solicitor, the plaintiff may cause to be

Rule *4. Where appearance entered for him, notice to be inserted in "Gazette."

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inserted in the "London Gazette" a notice, that on a day in such notice named (being not less than four weeks after the first insertion of such notice in the "London Gazette"), the Court will be moved that the bill may be taken *pro confesso* against such defendant (*q*); and the plaintiff must, upon the hearing of such motion, satisfy the Court that such defendant ought, under the provisions of the 2nd Rule of this Order, to be deemed to have absconded (*r*) to avoid or to have refused to obey the process of the Court, and that such notice of motion has been inserted in the "London Gazette" at least once in every entire week reckoned from Sunday morning to Saturday evening (*s*) which shall have elapsed between the time of the first insertion thereof and the time for which the said notice is given; and the Court, if so satisfied, and if an answer has not been filed, may, if it so think fit, order the bill to be taken *pro confesso* against such defendant, either immediately, or at such time or upon such further notice (*t*) as under the circumstances of the case the Court may think proper (8th May, 1845; Ord. 79).

Motion may be made for any day in term.

(*q*) Every day in term being a motion day, it is not necessary that the day, if in term, should be "a seal day" (*Chaffers* v. *Baker*, 5 D. M. G. 482).

"Saving" motion.

The motion may be "saved" on the day mentioned in the "Gazette" until the next seal day, without the saving being expressly mentioned to the Court (*Torr* v. *Torr*, Johns. 660); and see *Postlethwaite* v. *Travers*, 1 N. R. 354; where the judge did not sit on a day in term for which notice to take the bill *pro confesso* had been given.

See also note (*k*) to last section.

Omission of defendant's name.

The omission of the name of the defendant against whom the bill is sought to be taken *pro confesso* in the advertisement, is a fatal defect (*Jones* v. *Brandon*, 3 Jur. N. S. 1146).

(*r*) See notes (*f*) and (*m*), *supra*.

Advertising replication and subpœna to hear judgment.

(*s*) See cases on advertising replication, cited, note (*e*), p. 462, *ante*. After replication has been advertised, and the time mentioned in the advertisement for going into evidence has expired, the plaintiff should set down the cause and obtain leave to advertise the subpœna to hear judgment (*Lechmere* v. *Clamp*, 29 Beav. 259). In this case the Court ultimately made a decree according to the prayer of the bill (30 Beav. 218). It was held in *Millar* v. *Elwin* (25 Beav. 674), that, where the plaintiff gave notice of motion to take the bill *pro confesso* at the end of six weeks, and advertised once in every one of the first four but not in the last two, there was a sufficient compliance with the rule.

"Every entire week."

See further as to advertisements, *Baker* v. *Dean*, 6 W. R. 719; *Wilkins* v. *Hogg*, 4 L. T. N. S. 12.

(*t*) See note (*o*) to last section.

Rule 5. Defendant in custody submitting to

5. Any defendant, being in custody for want of his answer, and submitting to have the bill taken *pro con-*

fesso against him, may apply to the Court, upon motion with notice to be served on the plaintiff, to be discharged out of custody; and thereupon the Court may order the bill to be taken *pro confesso* against such defendant, and may order him to be discharged out of custody upon such terms as appear to be just, unless it appears from the nature of the plaintiff's case, or otherwise to the satisfaction of the Court, that justice cannot be done to the plaintiff without discovery or further discovery from such defendant (8th May, 1845; Ord. 80) (*u*).

Defendant to have bill taken pro confesso may apply to be discharged.

(*u*) See *Maitland* v. *Rodger*, 14 Sim. 92; and note, p. 434, *ante*.

II. *Hearing—Decree.*

6. No cause in which an *order* (*v*) is made that a bill be taken *pro confesso* against a defendant shall be heard on the same day on which the order (*v*) is made; but the cause shall be set down to be heard, and the Court, if it so think fit, may appoint a special day for the hearing thereof (8th May, 1845; Ord. 81).

Rule 6. Hearing of cause taken pro confesso.

(*v*) The "order" referred to is the preliminary order referred to in note (*e*) to rule 1 (*Brown* v. *Home*, 8 Beav. 607). To set down a bill to be taken *pro confesso* against a sole defendant the Record and Writ Clerks must grant a certificate that the cause is in a fit state to be heard and a petition for the Lord Chancellor's fiat is not necessary (*Torr* v. *Torr*, Johns. 660).

Meaning of "order." Preliminary necessary in taking bill pro confesso against sole defendant.

7. A defendant against whom an order to take a bill *pro confesso* is made may appear at the hearing of the cause; and where he waives all objection to the order (*w*) but not otherwise, he may be heard to argue the case upon the merits as stated in the bill (8th May, 1845; Ord. 82).

Rule 7. Defendant may appear at hearing.

(*w*) The defendant wishing to argue the case on the merits is precluded from objecting that he has not been duly served with the order (*Greaves* v. *Greaves*, 12 Beav. 422).

Defendant cannot object that he has not been served.

8. Upon the hearing of a cause in which a bill has been ordered to be taken *pro confesso*, such decree shall be made as to the Court shall seem just (*x*), and in the case of any defendant who has appeared at the hearing and waived all objection to such order to take the bill *pro confesso*, or against whom the order has been made after

Rule 8. Decree when absolute.

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appearance by himself or of his own solicitor, or upon notice served on him or after the execution of a writ of attachment against him, the decree shall be absolute (8th May, 1845; Ord. 83) (*y*).

What decree may be obtained.

(*x*) The plaintiff is entitled under these words only to such a decree as he would have obtained if the defendants had appeared at the hearing, *Brierly* v. *Ward*, 15 Jur. 277, in which case a foreclosure suit was taken *pro confesso* against defendants who did not appear at the hearing, and it was held that the plaintiff was only entitled to the usual decree against them, and not to an immediate decree for absolute foreclosure, see *Stanley* v. *Bond*, 6 Beav. 421; *Hayes* v. *Brierley*, 3 Dr. & War. 274, there cited; *Simmonds* v. *Palles*, 2 J. & L. 489; *Haynes* v. *Ball*, 4 Beav. 101; *Loyd* v. *Loyd*, 2 Con. & L. 592; and where the defendant made default, but the plaintiff appeared to have no equity, the bill was dismissed (*Speidall* v. *Jervis*, Dick. 632).

Shortening of time for making decree absolute.

(*y*) In a suit to enforce a security and take accounts, the Court refused to shorten the period of three years, after which, under rule 15, *infra*, the decree could be made absolute, though the plaintiff contended that the delay would amount to a denial of justice, *Darlow* v. *Simcock*, 14 W. R. 664; but where the bill was ordered to be taken *pro confesso* against a bare trustee, the decree was made absolute in the first instance, *Leite* v. *Vicini*, 12 W. R. 897. See section 49 of the Trustee Act, 1850, p. 108, *ante*.

Rule 9. Power to order receiver, sequestration, &c.

9. In pronouncing the decree, the Court may, either upon the case stated in the bill, or upon that case and a petition presented by the plaintiff for the purpose, as the case may require, order a receiver of the real and personal estate of the defendant against whom the bill has been ordered to be taken *pro confesso* to be appointed with the usual directions, or direct a sequestration of such real and personal estate to be issued, and may (if it appear to be just) direct payment to be made out of such real or personal estate of such sum of money as at the hearing or any subsequent stage of the cause the plaintiff shall appear to be entitled to; provided that, unless the decree be absolute, such payment shall not be directed without security (*z*) being given by the plaintiff for restitution, in case the Court should afterwards think fit to order restitution to be made (8th May, 1845; Ord. 84).

(*z*) As to the security, see *Lett* v. *Randall*, 7 Jur. 1075, under the 1 Wm. 4, c. 36; and for form of decree, see *Torr* v. *Torr*, Johns. 660.

Rule 10. Decree on bill pro confesso to be passed and entered.

10. A decree founded on a bill taken *pro confesso* is to be passed and entered as other decrees (8th May, 1845; Ord. 85).

Rule 11.

11. After a decree founded on a bill taken *pro confesso*

has been passed and entered, an office copy thereof shall (unless the Court shall dispense with service thereof) (*a*) be served on the defendant against whom the order to take the bill *pro confesso* was made or his solicitor; and where the decree is not absolute under the 8th Rule of this Order, such defendant or his solicitor shall be at the same time served with a notice (*b*) to the effect that if such defendant desires permission to answer the plaintiff's bill and set aside the decree, application for that purpose must be made to the Court within the time specified in the notice (*c*), or that otherwise such defendant will be absolutely excluded from making any such application (8th May, 1845; Ord. 86).

Service of copy of decree and notice, where decree not absolute under rule 8.

(*a*) In *Kemp* v. *Latter*, 16 Jur. 770, where the defendants had been served with the original bill, and were also served with a supplemental bill in which the original decree was fully set out, the Court dispensed with the service on them of an *office copy of such decree*, and where a decree was made for foreclosure against a *cestui que trust*, and the bill was taken *pro confesso* against the trustee, the Court after the expiration of three years *dispensed with service of the decree* on the trustee *altogether*, and made the decree absolute against him, *Thurgood* v. *Kane*, 32 Beav. 156. So in the case of a bare trustee, service was dispensed with, and the decree was made absolute at once, *Leite* v. *Vicini*, 12 W. R. 897, and see note (*c*), page 475, *ante*, for cases where service of the preliminary motion is dispensed with. So in *Benbow* v. *Davies*, 12 Beav. 421, service of a decree of foreclosure on a trustee against whom the bill had been taken *pro confesso* was dispensed with.

When Court will and will not dispense with service of the decree.

In case of trustees.

But the mere fact that service will be difficult or expensive will not induce the Court to dispense with such service (*Vaughan* v. *Rogers*, 11 Beav. 165; and see *Brierly* v. *Ward*, 20 L. J. Ch. 46). The Court will not in general dispense with service where accounts are directed against the person to be served.

An accounting defendant ought to be served not only with the decree which directed the accounts, but with the *summons to proceed in chambers* on the decree, *Golden* v. *Newton*, Johns. 720; and see *King* v. *Bryant*, 3 M. & Cr. 191. The application to dispense with service ought not to be made till the three years mentioned in rule 15 have elapsed, *James* v. *Rice*, 5 D. M. G. 461; see *Benbow* v. *Davies*, 12 Beav. 421; *Dominicetti* v. *Latti*, 2 Dick. 588.

Not in case of accounting defendant.

Time for making application.

(*b*) As to this service being a foundation for an absolute decree where the defendant is out of the jurisdiction, see note (*g*), p. 483.

(*c*) Where a defendant has been served with *notice to proceed upon a decree* (see note (*a*), *supra*); the time within which he may apply to vary the decree only begins to run from the date of the *notice*, *Golden* v. *Newton*, l. c.

12. Where such notice as is mentioned in the 11th Rule of this Order is to be served within the jurisdiction of the Court, the time therein specified for such application to be made by the defendant shall be three weeks after service of such notice; but where such notice is to be served out of the jurisdiction of the Court, such time shall be specially appointed by the Court on the

Rule 12. Time for making application.

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ex parte application of the plaintiff (8th May, 1845; Ord. 87) (*d*).

(*d*) See note (*c*), *supra*.

Rule 13. Leave of Court before taking proceedings under decree.

13. No proceeding shall be taken, and no receiver appointed under the decree nor any sequestrator under any sequestration issued in pursuance thereof shall take possession of or in any manner intermeddle with any part of the real or personal estate of a defendant, and no other process shall issue to compel performance of the decree, without leave of the Court, to be obtained on motion with notice (*e*) served on such defendant or his solicitor, unless the Court shall dispense with such service (8th May, 1845; Ord. 88).

"On motion with notice."

(*e*) The words "on motion with notice" apply not to the proceedings for appointing the receiver, but only to his taking possession of the estates when appointed (*Dresser* v. *Morton*, 2 Ph. 285, followed in *James* v. *Rice*, 5 D. M. G. 46). When, therefore, the appointment of a receiver has been directed, the chief clerk may *appoint* him without serving the defendants (*ibid.*).

Process of contempt against defendant served with notice of decree.

When the defendant had been served with a copy of the decree under rule 11, and could not afterwards be found, the Court gave the plaintiff leave to issue out process of contempt against him (*Brown* v. *Home*, 10 Beav. 400).

Rule 14. Rehearing on merits.

14. Any defendant waiving all objection to the order to take the bill *pro confesso*, and submitting to pay such costs as the Court may direct, may, before inrolment of the decree, have the cause reheard upon the merits stated in the bill; the petition for rehearing being signed by counsel as other petitions for rehearing (8th May, 1845; Ord. 89) (*f*).

(*f*) See as to petitions of rehearing generally, Ord. XXXI. 1, and notes.

Rule 15. Decree not absolute under rule 8 when absolute.

15. Where a decree is not absolute under the 8th Rule of this Order, the Court may order the same to be made absolute on the motion of the plaintiff, made,

Article (1). (1.) After the expiration of three weeks from the service (*g*) of a copy of the decree on a defendant, where the decree has been served within the jurisdiction.

Article (2). (2.) After the expiration of the time limited by the notice provided for by the 11th Rule of this Order, where the decree has been served without the jurisdiction (*h*).

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Article (3).

(3.) After the expiration of three years from the date of the decree, where a defendant has not been served with a copy thereof (*i*).

And such order may be made either on the first hearing of such motion, or on the expiration of any further time which the Court may on the hearing of such motion allow to the defendant for presenting a petition for leave to answer the bill (8th May, 1845; Ord. 90).

(*g*) Dispensing with service does not count as service so as to bring a case within this clause, *Barlow* v. *Simcock*, 14 W. R. 664.

(*h*) Service on the defendant of an order limiting the time within which he may apply to set aside a decree *pro confesso* is a sufficient service under rule 11, to ground the application to make the decree absolute under this rule (*Trilly* v. *Keefe*, 16 Beav. 83).

(*i*) See note (*a*), p. 481, *supra*.

Pro confesso decree made absolute:

(1.) Where defendant is *served*;

(2.) Where defendant is *not served*.

Rule 16. Petition for leave to answer, where decree not absolute under rule 8 or 15.

16. Where the decree is not absolute under the 8th Rule, and has not been made absolute under the 15th Rule of this Order, and a defendant has a case upon merits not appearing in the bill, he may apply to the Court by petition, stating such case, and submitting to such terms with respect to costs and otherwise as the Court may think reasonable, for leave to answer the bill; and the Court, if satisfied that such case is proper to be submitted to the judgment of the Court, may, if it think fit, and upon such terms as seem just, vacate the enrolment (if any) of the decree, and permit such defendant to answer the bill (*k*); and where permission is so given to put in an answer, leave may be given to file a separate replication to such answer, and issue may be joined, and witnesses examined, and such proceedings had as if the decree had not been made and no proceedings against such defendant had been had in the cause (8th May, 1845; Ord. 91).

(*k*) Upon a fair case being made out, the Court will act under this rule upon the defendant's paying the costs of the application and of the suit (*Inglis* v. *Campbell*, 2 W. R. 396).

Rule 17. Representatives of parties bound.

17. The rights and liabilities of any plaintiff or defendant under a decree made upon a bill taken *pro confesso* shall extend to the representatives of any deceased plain-

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tiff or defendant, and to any persons claiming under any person who was plaintiff or defendant at the time when the decree was pronounced. And with reference to the altered state of parties and any new interests acquired, the Court may, upon motion or petition served in such manner and supported by such evidence as under the circumstances of the case the Court may deem sufficient, permit any party or the representative of any party to file such bill, or adopt such proceedings as the nature and circumstances of the case require, for the purpose of having the decree (if absolute) duly executed, or for the purpose of having the matter of the decree (if not absolute) duly considered, and the rights of the parties duly ascertained and determined (8th May, 1845; Ord. 92).

New interests how far saved.

ORDER XXIII.

ORDER XXIII. Decrees and Orders.

DECREES AND ORDERS (*a*).

Rule 1. Meaning of the words "The Judge," "The Taxing Master," "The Clerk of Records and Writs," in a decree or order.

1. In any decree or order where the words "The Judge" are used, such expression shall mean the judge to whose court the cause or matter wherein such decree or order is made is for the time being attached. Where the words "The Taxing Master" are used, such expression shall mean the Taxing Master in rotation, or, in case any previous reference shall have been made, the Taxing Master to whom the cause or matter stands referred, as the case may be; and where the words "The Clerk of Records and Writs" are used, such expression shall mean the Clerk of Records and Writs in whose division the cause or matter wherein such order is made, is (22nd Aug. 1859; Ord. 18).

Subpœna to hear judgment. Date of decree. Order irregularly obtained.

(*a*) As to subpœnas to hear judgment, see Ord. XXI. 1, p. 470.

A decree is held to be made on the day when it is pronounced, not on the day when it is drawn up, *Re Risca Coal Company*, 10 W. R. 701.

An order *irregularly obtained* should be properly discharged, and not treated as a nullity, see note (*c*), p. 395, *ante*.

As to the production of the briefs to the registrar, see Ord. I. 28 (p. 375, *ante*); and as to the documents, &c., which should be left on bespeaking decrees, see Appendix, p. lxxxiii, *post.*

Production of briefs.

2. It shall not be necessary in drawing up any decree or order, to insert the year of the Sovereign, or to recite any of the pleadings or any part of the petition or notice of motion, as the case may be, or any previous decree or order in the cause or matter, or any report, certificate, affidavit, or other document that has been, or before the decree or order is completed shall be, filed or recorded in the court; but it shall be sufficient to refer thereto (*b*); save only that in matters of contempt, or where the decree or order varies from some general rule, and in such other cases as the Court shall direct or the registrar shall in his discretion see fit (*c*), the registrar shall make such short recitals as may be necessary to show the grounds on which the decree or order is granted (12th April, 1853. 21st Dec. 1833; Ord. 27).

Rule 2. Form of decrees and orders.

(*b*) To avoid the necessity of reciting a settled scheme for a charity, the order for the settlement may refer to a copy of the scheme settled, approved, signed by the judge, and filed (*Re Conyer's School*, 22 L. J. Ch. 707).

Reference instead of recital.

Where a plaintiff reads part of a defendant's answer, the whole answer is entered as read, (*Manby* v. *Bewicke*, 3 Jur. N. S. 685), and on a motion for a decree, whereon a plaintiff can read a defendant's answer without notice (see note (*i*), p. 170), he is entitled to have it entered in the decree as read (*Bright* v. *Legerton*, 29 Beav. 69). When a defendant is not called on, he is entitled to have all his evidence entered as read (*Manby* v. *Bewicke*, l. c., which see as to entering office copies of former proceedings in other suits). And all affidavits which have been filed, and which a party gives notice that he will read on the hearing of a motion, though not mentioned at such hearing, should be entered as read, *Catholic Publishing, &c. Company* v. *Wyman*, 1 N. R. 49.

Entering answers, evidence, &c., as read.

Evidence should not be entered as read *de bene esse* (*Parker* v. *Morrell*, 2 Phil. 453; *Watson* v. *Parker*, *ibid.* 5), not even by consent (*McMahon* v. *Burchell*, 2 Phil. 127), nor "saving just exceptions" (*Sherwood* v. *Beveridge*, 2 Coll. 536; *Drake* v. *Drake* (No. 1), 25 Beav. 641; but see *Gee* v. *Gurney*, 8 Beav. 315).

Nor to be entered as read *de bene esse:*

Where it does not appear by the registrar's minutes that any evidence was read, the Court will not, on a subsequent application, order evidence to be entered as read (*Bute* v. *Eden*, 1 Bro. P. C. 499; see, too, Seton, 22).

Not on subsequent application.

(*c*) The case of *Davenport* v. *Stafford*, 8 Beav. 503, should be consulted as to the latitude allowed to the registrars in drawing up decrees and the variations which they may make therein (comp. *Philips* v. *Gibbons*, 1 V. & B. 184, 186, and *Taylor* v. *Milner*, 10 Ves. 444).

Power of registrars to make variations.

As to correcting slips in the drawing up of decrees, see notes to rule 21, *infra*, p. 493, and as to applying on the minutes, see note (*w*) *ibid.*

3. Where any sums of money or any securities or other effects belonging to the suitors of the Court are directed to be paid into or deposited in the Bank, with the privity

Rule 3. Money, &c., to be expressed in words written at length.

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of the Accountant-General, or to be paid out, or invested in the purchase of stocks, funds, or securities; or where any stocks, funds, or shares are directed to be transferred into the name and with the privity of the Accountant-General, or to be transferred out of court, carried over, or delivered out, the exact sum of money, the amount of the stocks, funds, shares or securities, and the particulars of the effects so to be paid in, transferred, or deposited, or so to be paid out, invested, transferred out, carried over, or delivered out, shall be ascertained by the registrar, and specified and expressed in the decree or order, in words written at length; except in the case of residues or shares of residues of money, stocks, funds, or securities remaining after a portion directed to be applied for particular purposes, the amount of which cannot be ascertained at the time of making the decree or order (*d*); in which cases the amount of such residues or shares of residues shall be verified by affidavit without any direction for that purpose in the decree or order, unless such residues or shares shall be certified by the Taxing Master, who shall be at liberty to certify the same without a direction for that purpose in such decree or order (21st Dec. 1833; Ord. 28. 22nd Aug. 1859; Ord. 12).

Residues and shares of residues.

(*d*) See *Piggott* v. *Garraway*, 9 Sim. 260.

Rule 4. Residues to be verified, and expressed in words written at length.

4. Where a residue of cash, stocks, funds, shares, or securities is directed by any decree or order to be operated upon by the Accountant-General, the exact amount of such residue, where the same can be done (*e*), shall (if required by the registrar) be verified by affidavit to be produced to the registrar, and shall be expressed and specified in the decree or order in words at length, so that the amount of such residue may appear on the face of the decree or order (21st Dec. 1833; Ord. 28. 7th Dec. 1839).

(*e*) See *Piggott* v. *Garraway*, l. c.

Rule 5. Persons by or to whom money, &c., is to be paid, &c.,

5. All persons, whether representatives or others, who are directed to pay into, or deposit in, the Bank any sum of money, securities, or other effects with the privity of

the Accountant-General, or to transfer any stocks, funds, or shares into his name and with his privity, and all persons, whether representatives or others, to whom any sums of money, stocks, funds, shares, securities, or other effects are directed to be paid out, transferred, carried over, or delivered out, shall, except in the case of bodies corporate, companies, or societies, be described by name in the decree or order, and not merely as plaintiffs or petitioners or the like, unless such payments, transfers, carryings over, or deliveries are directed to be made to or by representatives, and no probate or letters of administration shall have been taken out at the time of making such decree or order. And the christian names and surnames or titles of honour of all such persons, and the titles of all such bodies corporate, companies, and societies, shall be written at length and without abbreviations in such decrees or orders (21st Dec. 1833; Ord. 28).

to be described by name.

6. In all decrees or orders directing the payment of interest, dividends, annuities, or other periodical payments, the time when the first of such payments, and when all subsequent periodical payments, whether quarterly, half-yearly, yearly, or otherwise, shall be made, shall be specified and expressed in words at length (21st Dec. 1833; Ord. 28).

Rule 6. Time for payment of periodical payments to be expressed in words written at length.

7. Where any stocks, funds, shares, or securities, standing in the name of the Accountant-General, in trust in or to the credit of any cause, matter, or account, or any part thereof, are or is directed to be divided and transferred or delivered out of court to or among several persons, or to be carried over to several separate accounts; and where any money is directed to be paid out to or among several persons, or carried over to several separate accounts, the registrar shall be at liberty, where it shall appear to him to be more convenient so to do, to state the respective amounts of such stocks, funds, shares, securities, or money to be so transferred, paid, or carried over, in a schedule at the foot of the decree or order; and it shall be sufficient to refer to such schedule in the mandatory part of the decree or order; but in every such case

Rule 7. Schedule to Order.

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the total amount of the stocks, funds, shares, securities, or money, respectively, to be dealt with in such schedule, shall be stated in words at length in the mandatory part of the decree or order (22nd Aug. 1859; Ord. 15).

Rule 8. Direction as to payment of proportion of interest, &c., to personal representatives of tenant for life.

8. Where, upon or after the death of any person to whom the interest or dividends of any stocks, funds, shares, or securities standing in the name of the Accountant-General, in trust in or to the credit of any cause, matter, or account, or any part of such interest or dividends, were or was payable for life, an order is made for the sale, transfer, or delivery of such stocks, funds, shares, or securities, or for payment of the interest or dividends to accrue due thereon subsequently to the death of such person: the same order shall also provide for the payment to the legal personal representatives of such person, of such proportion of the interest or dividends on such stocks, funds, shares, or securities, as shall have accrued between the last period of payment, and the day of his death, unless the Court or judge shall be of opinion that such legal personal representatives are not entitled thereto, or shall for any other reason otherwise direct (22nd Aug. 1859; Ord. 11).

Rule 9. Legacy or succession duty on fund in court.

9. Every decree or order whereby the Accountant-General is directed to pay or transfer any fund or part of any fund in respect of which any duty shall be payable to the revenue under the Acts relating to legacy or succession duty, shall, unless such decree or order expressly provides for the payment of the duty, also direct the Accountant-General to have regard to the circumstance that such duty is payable. And where by any decree or order any carrying over to a separate account of any fund in respect of which any such duty may be chargeable is directed, the words, "subject to legacy duty," or "subject to succession duty," as the case may be, shall be added to the title of the account. And in order the better to provide security against the payment or transfer by the Accountant-General of any fund chargeable with any such duty, without the duty being first paid, the Accountant-General, on receiving notice from the proper officer that

the duty is payable, shall cause a memorandum to be made in his books in conformity with such notice; and the Accountant-General, before executing any decree or order directing the payment or transfer of any fund or part of any fund in respect of which any such duty shall be payable, shall require the production of the official receipt for the duty, or a certificate from the proper officer of the payment of the duty, chargeable in respect of any such fund or any part thereof respectively, by any such decree or order directed to be paid or transferred (9th March, 1854) (*f*).

(*f*) See 36 Geo. 3, c. 52 (the Legacy Duty Act), s. 25, and 16 & 17 Vict. c. 51 (the Succession Duty Act), s. 53, which provides that "whenever any suit shall be pending in any court for the administration of any property chargeable with duty under this Act, or the Legacy Duty Act, such Court shall provide, out of any property which may be in the possession or control of the Court, for the payment of the duty to the commissioners." The duty is usually paid to the solicitor on his undertaking to apply it properly. Where it was very large it was ordered to be paid to the proper officer at the Stamp Office (see Seton, p. 84). To whom duty paid.

See further, as to the order, *Bryan* v. *Mansion*, 5 W. R. 483, where an incumbrancer who had received the dividends without paying the legacy duty was, on the petition of the Attorney-General, ordered to pay the same with the costs of the petition. But in *Hicks* v. *Keat*, 3 Beav. 141, a petition by the Attorney-General, for payment of a sum returned to the administrator, under false representations, as overpaid in respect of probate duty, *presented before the accounts had been passed*, was dismissed as premature. When ordered to be repaid.

Rule 10. Decrees and orders to state the time after service for doing the act required. Memorandum.

10. Every decree or order made in any suit *or matter* (*g*), requiring any person to do an act thereby ordered, shall state the time (*h*), or the time after service of the decree or order, within which the act is to be done; and upon the copy of the decree or order which shall be served (*i*) upon the person required to obey the same, there shall be indorsed a memorandum in the words or to the effect following, viz:—"If you, the within-named A. B., neglect to obey this decree [*or* order] by the time therein limited, you will be liable to be arrested under a Writ of Attachment (*k*) issued out of the High Court of Chancery, or by the Serjeant-at-Arms attending the same Court, and also be liable to have your estate sequestered for the purpose of compelling you to obey the same decree [*or* order]" (18th July, 1857; amending 12th Ord. of 11th April, 1842) (*l*).

(*g*) See note to *Re Minter*, 19 Beav. 34.

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(*h*) When the time is not stated, the decree or order is not thereby made ineffectual, but the Court on motion will fix a time (*Needham* v. *Needham*, 1 Hare, 633).

When time not stated.

(*i*) The service must be *personal* (*Roby* v. *Scholes*, 1 W. R. 118; *Re Lloyd*, 10 Beav. 451; and see *Whistler* v. *Aylward*, Drury, 1; *Re Wisewold*, 16 Beav. 357; *Duffield* v. *Elwes*, 2 Beav. 268; *Gooch* v. *Marshall*, 8 W. R. 410); unless the Court grants an application for substituted service, see note (*b*), p. 419, *ante*.

Service when required to be personal, and when substituted.

But the affidavit of personal service need not state *where* it was effected, *Re Job*, 27 Beav. 32.

Where a day is named before which the act is to be done, the order must be served before that day, *Duffield* v. *Elwes* (l. c.).

(*k*) The attachment may issue at once, see Ord. XXIX. 1, *post*.

(*l*) For the form of indorsement in the case of a peer, M.P., or corporation, see Daniell, 939.

Rule 11. Decree saving the rights of absent parties.

11. Where a defendant, at the hearing of a cause, objects that a suit is defective for want of parties, and has not by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the Court, if it shall think fit, may make a decree saving the rights of the absent parties (26th Aug. 1841; Ord. 40) (*m*).

What parties within rule.

(*m*) Compare sects. 42 & 44 of 15 & 16 Vict. c. 86, pp. 195, 199, *ante*.

A decree was under this rule made in the absence of the assignees of a bankrupt (*Maybery* v. *Brooking*, 7 D. M. G. 673); of the heir-at-law of a surviving trustee (*Faulkner* v. *Daniel*, 3 Hare, 199, and comp. *May* v. *Selby*, 1 Y. & C. C. C. 235); of a mortgagee (*Fulton* v. *Clark*, 1 De G. & Sm. 307); of a person entitled upon a remote contingency (*Daubuz* v. *Peel*, 1 Coop. Rep. temp. Cottenham, 365).

But the husband of a female plaintiff or defendant is not within the rule (*Russell* v. *Lucy*, 18 L. J. Ch. 464); nor a debtor who has assigned his property in trust for his creditors, *Kimber* v. *Ensworth*, 1 Hare, 293. (See note, p. 201, *ante*.)

Consequence of cause being defective for want of parties.

As to making a decree on appeal, in the absence of some of the parties interested, see *Goulder* v. *Camm*, 29 L. J. Ch. 135. If at the hearing the cause is found to be defective for want of parties, and after liberty to amend being given, the cause on being brought on again is found to be still defective, the Court will dismiss the bill (*Williams* v. *Page* (No. 4), 28 Beav. 148). See note (*f*), p. 139, *ante*. See further, as to cause being defective for want of parties at hearing, *Leyland* v. *Leyland*, 10 W. R. 149.

Rule 12. Decree where defendant makes default at hearing.

12. Where a defendant makes default at the hearing of a cause, the decree shall be absolute in the first instance, without giving the defendant a day to show cause; and such decree shall have the same force and effect as if the same had been a decree *nisi* in the first instance, and afterwards made absolute in default of cause shown by the defendant (26th Aug. 1841; Ord. 44) (*n*).

What decree may be made.

(*n*) The practice under this rule has been to hear the cause, and give the plaintiff such a decree as upon the pleadings and evidence he is entitled to

(*Hakewell* v. *Webber*, 9 Hare, 541; *Browne* v. *Smith*, 5 Jur. 1195). See, too, Ord. XXII. 8, and note (*x*), p. 480, *ante*, and *Hughes* v. *Jones*, 26 Beav. 24.

Rule 13. Dismissal on plaintiff's application or default equivalent to dismissal on merits.

13. If the plaintiff, after the cause is set down to be heard, causes the bill to be dismissed on his own application (*o*), or if the cause is called on to be heard in Court and the plaintiff makes default (*p*), and by reason thereof the bill is dismissed, such dismissal, unless the Court shall otherwise direct, shall be equivalent to a dismissal on the merits, and may be pleaded in bar to another suit for the same matter (8th May, 1845; Ord. 117) (*q*).

Plaintiff dismissing own bill *with* costs.

(*o*) Plaintiff may move to dismiss his bill *with costs* at any time *before decree*, notwithstanding that a motion is pending in the suit, the costs of which may afterwards have to be paid by the defendant, *Markwick* v. *Pawson*, 4 N. R. 528. *Secus*, where any proceeding in the cause has given the defendant a right against the plaintiff (see Daniell, 731), *e.g.*, if the original bill and a cross bill are to be heard together, *Booth* v. *Leycester*, 1 Keen, 247; and *after decree* the plaintiff cannot dismiss, but see *Barton* v. *Barton*, 3 K. & J. 512.

Without prejudice to costs.

The order may be made "without prejudice to the question by whom the costs are ultimately to be borne," but such order must be obtained in court, *Clements* v. *Clifford*, 14 W. R. 22; *Berndston* v. *Churchill*, 1 W. N. (1866), 8; see *Wigginton* v. *Pateman*, 12 Jur. 89.

Without costs:

Under the following circumstances a plaintiff has been allowed to dismiss his bill *without* costs:—

(1) In case of mistake;

1. If the bill was filed under a mistake common to both parties, *Broughton* v. *Lashmar*, 5 M. & C. 136. See, too, *Hansard* v. *Hardy*, 18 Ves. 460.

(2) where defendant offers all that could be gained by the suit;

2. If the defendant has given the relief sought by the suit, *Wilde* v. *Wilde*, 10 W. R. 368, 503 (where, however, the plaintiff did not get all the costs of the suit), or if the bill has become unnecessary, but was originally justified by the defendant's misconduct or fraud, *Elsey* v. *Adams*, 2 D. J. S. 147; *Knox* v. *Brown*, 1 Bro. C. C. 186; *Godday* v. *Sleigh*, 3 W. R. 87; but see *Ventilation and Sanitary Improvement Company* v. *Edelston*, 11 W. R. 613, where the motion was refused, the defendants resisting it, but the costs were made costs in the cause.

(3) plaintiff misled by court.

3. Where the plaintiff has been misled by a suggestion of the Court, *Lister* v. *Leather*, 1 De G. & J. 361; and see cases there cited.

As to a plaintiff taking a bill off the file which was filed without authority, see note (*r*), p. 166.

Dismissal for default.

(*p*) Before a bill is dismissed for default, an affidavit of service of subpœna to hear judgment must be produced (*Rigg* v. *Wall*, 3 M. & Cr. 505; but see *Charlton* v. *Allen*, 9 Hare, App. lxvii; *Bell* v. *Hornby*, 14 Beav. 439).

(*q*) As to pleading a decree, see *ante*, p. 446.

Rule 14. Inquiry as to personalty outstanding or undisposed of.

14. Every decree or order for an account of the personal estate of a testator or intestate shall contain a direction for an inquiry what parts (if any) of such personal estate are outstanding or undisposed of, unless the Court shall otherwise direct (26th Aug. 1841; Ord. 45).

Rule 15. Accounts and inquiries to be numbered.

15. Where by any decree or order, whether made in court or in chambers, any accounts are directed to be taken or inquiries to be made, each direction shall be

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numbered, so that, as far as may be, each distinct account and inquiry may be designated by a number, and such decree or order may be in the form set forth in Schedule (D.), with such variations as the circumstances of the case may require (16th Oct. 1852; Ord. 8) (*r*).

(*r*) See Schedule D., Appendix p. v, and see Ord. XXXV. r. 16, *post*.

Rule 16. Just allowances.

16. In taking any account directed by any decree or order, all just allowances shall be made, without any direction for that purpose in such decree or order (22nd Aug. 1859; Ord. 16) (*s*).

(*s*) As to "just allowances," see Seton, p. 103. It is not usual for the Court to determine in the first instance what is a just allowance (per Lord Eldon in *Brown* v. *De Tastet*, Jac. 294).

Rule 17. Drawing up, passing, and entering of orders on petitions of course.

17. With a view to the convenience of the suitors and their solicitors, and for the purpose of diminishing the expense of orders on petitions of course which according to the practice of the Court may be presented to the Master of the Rolls, one of the secretaries of the Master of the Rolls shall, upon any such petitions of course (except upon petitions for setting down causes to be re-heard) which shall be presented to his Honour, instead of answering such petitions, draw up the orders thereon in such form as the Master of the Rolls shall from time to time direct, every such order to be signed as passed with the initials of such secretary; and the under secretary shall enter, or cause to be entered, every such order in a book to be kept at the secretary's office at the Rolls for that purpose, and shall then mark and sign such order with his initials, as entered; and the suitors of the Court and their solicitors shall have access to the said book, during office hours, without the payment of any fee. And every such order so to be made as aforesaid shall have the same force and effect as orders of course passed by the registrars have (21st Dec. 1833; Ord. 29).

Rule 18. Time for motion to add to a decree under 15 & 16 Vict. c. 86, s. 42.

18. The time within which a party served with a notice of a decree under the Stat. 15 & 16 Vict. c. 86, s. 42, may apply to the Court to add to the decree, shall be one

month after such service (7th Aug. 1852; 1st Set, Ord. 40) (*t*). ORDER XXIII. Decrees and Orders.

(*t*) See note (*d*) to the Act, p. 197, *ante*.

19. A memorandum of the service upon any person of notice of the decree in any suit under the 8th Rule of the same section, shall be entered in the office of the Clerks of Records and Writs, upon due proof by affidavit of such service (7th Aug. 1852; 1st Set, Ord. 41). Rule 19. Memorandum of service of notice of decree.

20. Notice of a decree or order served pursuant to the 8th Rule of the same section shall be entitled in the cause, and there shall be endorsed thereon a memorandum in the form or to the effect following, that is to say, "Take notice that, from the time of the service of this notice, you [*or, as the case may be*, the infant, or person of unsound mind] will be bound by the proceedings in the above cause in the same manner as if you [*or*, the said infant, or person of unsound mind] had been originally made a party to the suit; and that you [*or*, the said infant, or person of unsound mind] may, by an order of course, have liberty to attend the proceedings under the within-mentioned decree [*or*, order]; and that you [*or*, the said infant, or person of unsound mind] may, within one month after the service of this notice, apply to the Court, to add to the decree [*or*, order]" (1st June, 1854; Ord. 8) (*u*). Rule 20. How notice entitled and endorsed.

(*u*) The rule applies to service on infants (*Clarke* v. *Clarke*, 9 Hare, App. xiii).

21. Clerical mistakes in decrees or orders, or errors arising from any accidental slip or omission, may at any time *before enrolment* (*v*) be corrected upon motion or petition, without the form and expense of a rehearing (3rd April, 1828; Ord. 45) (*w*). Rule 21. Clerical mistakes corrected.

(*v*) After enrolment, no alteration is to be made but on bill of review, Ord. XXXI. 9, *post*, but the Court has notwithstanding in some cases corrected accidental slips after enrolment, upon petition, *Fearon* v. *Desbrisay*, 21 L. J. Ch. 511; *Viney* v. *Chaplin*, 3 De G. & J. 282; *Hewitt* v. *White*, 14 W. R. 220; *Attorney-General* v. *Greenhill*, 34 Beav. 174; but see next note. Cases where slips have been corrected even *after* enrolment.

(*w*) Where the order was made at chambers, the application to correct it is usually by summons.

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What corrections not within rule.

The rule does not extend to the omission of any term which could only have been introduced under the express judgment of the Court (*Bird* v. *Heath*, 6 Hare, 236; and see *Fyler* v. *Fyler*, 1 Coll. 93; *Dodson* v. *Sammell*, 8 W. R. 252), or to any alteration which is equivalent to a new direction (*Colman* v. *Sarell*, 2 Cox, 206; *Whitehead* v. *North*, 1. c.; *Willis*, v. *Parkinson*, 3 Swanst. 233; *Brookfield* v. *Bradley*, 2 S. & S. 64; *Champernowne* v. *Brooke*, 9 Bligh, N. S. 199). See, however, Ord. XXXV. 19, *post*, as to varying orders made during the prosecution of decrees.

But an accidental slip (*Turner* v. *Hodgson*, 9 Beav. 265), *ex gr.* the omission of the usual direction to settle the conveyance, may be supplied by petition under it (*Trevelyan* v. *Charter*, *id.* 140); and see *Hughes* v. *Jones*, 26 Beav. 24, where a decree for specific performance having been made against the defendant (who made default) without a reference as to title, the Court, on the motion of the defendant, ordered a reference as to title to be inserted in the decree, the defendant paying the costs of the application.

What corrections are within the rule.

In *Jefferys* v. *Smith*, 11 W. R. 479, the words "survivors or survivor," were added to a decree for payments to four executors, and in *Re Tiel*, *ibid.* 351, a decree, though passed and entered, was altered on motion, the plaintiff, who was directed by the decree to pay costs, having been dead when the decree was pronounced; see *Pennell* v. *Millar*, 23 Beav. 172; *Moore* v. *Walter*, 11 W. R. 713. In *Askew* v. *Peddle*, 14 Sim. 301, a mistake in a decree was corrected, although it had been pronounced seven years, and the case had been heard on further directions.

Applying on minutes.

Where a party has liberty given him to apply to the Court on the minutes of a decree, he must do so within a fortnight. After that time, notice of motion, specifying the variations sought to be introduced, must be regularly given (*Hood* v. *Cooper*, 26 Beav. 373; see further, notes to Ord. XXXIII. and XXXIV.). See, too, *Prince* v. *Howard*, 14 Beav. 203.

Rule 22. Non-performance of condition on which decree has been obtained.

22. Where any person who has obtained any decree or order upon condition, does not perform or comply with such condition, he shall be considered to have waived or abandoned such decree or order so far as the same is beneficial to himself; and any other person interested in the matter may, on breach or non-performance of the condition, take either such proceedings as the decree or order may in such case warrant, or such proceedings as might have been taken if no such decree or order had been made, unless the Court shall otherwise direct (8th May, 1845; Ord. 119).

Rule 23. No order on petition, &c., filed until original petition, &c., filed.

23. No order made on a petition, and no order to make a submission to arbitration or an award an order of the Court, and no decree or order wherein any written admissions of evidence are entered as read, shall be passed, until the original petition (*x*), submission to arbitration, award, or written admissions of evidence, shall have been filed in the Report Office, and a note thereof made on the decree or order by the Clerk of Reports (21st Dec. 1833; Ord. 27. 26th April, 1647. 27th May, 1687).

(*x*) But where the original petition had been lost, the Court allowed the copy left with the judge to be filed (*Smith* v. *Harwood*, 1 Sm. & G. 137; *Sanderson* v. *Walker*, 1 M. & Cr. 359; see, however, *Re Hobler*, 9 Jur. 419); and where the petitioner refused to deliver up the original petition for the purpose of being filed, the respondents were allowed to file the copy served on them in its place (*Andrews* v. *Walton*, 1 M. & Cr. 360; *Re Devonshire*, 32 Beav. 241); but the petitioner must pay the costs of the application, *ibid.* The copy filed should be certified by the judge's secretary to be a true copy (*Sanderson* v. *Walker*, l. c.)

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Where original petition lost.

Rule 24. Recitals and statements in enrolments.

24. For the purpose of diminishing expense in the enrolment of decrees and orders, no part of the statements or allegations contained in any bill, answer, petition, notice of motion, affidavit, report, or certificate, shall be recited or stated in any such enrolment, but it shall be sufficient to state in such enrolment the filing of the bill or petition, or service of the notice of motion, with the names of the parties thereto, together with the prayer of the bill or petition, or the object of the notice of motion, the filing of the several answers and other pleadings or proceedings, and the short purport or effect of any decree or order, made, had, put in, or taken, before the date of the decree or order enrolled and leading thereto. And no decree or order shall be enrolled until the Clerk of Records and Writs, in whose division the cause or matter may be, shall have inspected the docket of such enrolment, and shall have certified thereon that the statement of the pleadings, decrees, orders, reports, certificates, and proceedings therein contained is correct (17th March, 1843).

Certificate by Record and Writs Clerks.

Rule 25. Enrolment within six months.

25. All decrees and orders pronounced or made in any cause or matter in this Court which shall be enrolled, shall be so enrolled (*y*) within six calendar months after the same shall be so pronounced or made respectively, and not at any time after, without special leave of the Court, such leave to be obtained in manner next hereinafter mentioned (7th Aug. 1852; 2nd Set, Ord. 2).

(*y*) As to enrolling in England the orders made by a Scotch court in the course of winding up a company, see 21 & 22 Vict. c. 60, ss. 12, 13; and *Re Western Bank of Scotland*, 1 D. F. J. 1.

Enrolment of orders made in a foreign court.

Rule *26. Enrolment after six months.

*26. Where any party is desirous to enrol a decree or order, after the expiration of six calendar months and within five years from the time the same shall have been

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made, he may apply by motion to the judge to whose court the cause is attached for an order for that purpose (*z*); and such order, unless made by consent of the opposite party (*a*), or on notice to all the parties, shall be a conditional order in the first instance, but shall become absolute without further order, unless cause be shown against it within twenty-eight days after service thereof (*b*) (7th Aug. 1852; 2nd Set, Ord. 3).

Application for enrolment even after appeal, to be made to court below.

(*z*) Even when the original decree has been reversed, the application for leave to enroll should, it seems, be made to the Court which pronounced the first decree (*Webb* v. *The Direct London and Portsmouth Railway Company*, 10 Hare, App. xvi); and similarly where the court of appeal has taken cognizance of a suit by directing an issue raised therein to be tried before itself, *Foxwell* v. *Bradbury*, 12 L. T. N. S. 70.

Payment of the costs of an appeal were not made a condition of granting the leave to enroll, though the costs of the application for leave were required to be paid before the enrolment (*Butchard* v. *Dresser*, Kay, App. xxvii.

When enrolment made at once.

(*a*) When all the parties appeared and consented, the Court ordered the enrolment at once (*Harrison* v. *The Corporation of Southampton*, 2 W. R. 183). So, where all other parties had been served with notice of the motion and did not appear (*Wellesley* v. *Mornington*, 22 L. T. 233). Where a defendant was lunatic, the order was made on notice to the solicitor of the lunatic on the record, *Smith* v. *Whitmore* (2), 11 L. T. N. S. 507.

Order made subject to appeal within 28 days.

(*b*) In *Sherwin* v. *Shakspeare*, 18 Beav. 527, the Master of the Rolls, upon an application to enroll a decree after the six months, made the order to enroll the decree at the end of twenty-eight days, if there should be no appeal in the meantime, observing that the defendants were entitled to the same delay as they would have obtained by entering a caveat; as to which, see note (*c*), next page, and Daniell, 921; and compare *Davison* v. *Robinson*, 4 K. & J. 754, where the order for enrolment was to be made absolute in case no petition of appeal was presented in the twenty-eight days.

Onus lies on party resisting application.

Upon an application under this as under the preceding rule, the burden of showing cause why the decree should not be enrolled lies with the party resisting the application (*Kay* v. *Smith*, 7 D. M. G. 383); and mere dealings with the property the subject-matter of the suit by the successful party, since the decree, are no ground for an application to vacate the conditional order, *Chapman* v. *Brown*, 15 W. R. 474.

Vacating enrolment.

"An enrolment ought not to be vacated except upon strong grounds of surprise, or something approaching to deception or *mala fides*," per Lord Chelmsford, in *Wildeman* v. *Lade*, 4 De G. & J. 401, where, some communication having passed between the solicitors, with reference to an appeal, the solicitor of the party applying to vacate the enrolment made an affidavit thereof, but did not state that he was misled, and the application was refused; see *Hill* v. *Curtis*, 1 L. R. Ch. 425; *Fray* v. *Drew*, 13 W. R. 797. See further, as to vacating the enrolment of a decree on the ground of bad faith, surprise, or otherwise, *Wickenden* v. *Rayson*, 25 L. J. Ch. 162; *Balguy* v. *Chorley*, 1 M. & K. 640; *Barnes* v. *Wilson*, 1 R. & M. 486; *Backhouse* v. *Wyld*, 3 Jur. N. S. 398; *Williams* v. *Page*, 1 De G. & J. 561; *Pearce* v. *Lindsay*, 4 De G. & J. 211; *Hargrave* v. *Hargrave*, 3 M. & G. 348; *Fryer* v. *Davis*, 1 L. R. Ch. 390; *Hill* v. *South Staffordshire Railway Company*, 2 D. J. S. 230. But it is no ground for vacating an enrolment that the party enrolling knew of the other side's intention to appeal, *Hill* v. *Curtis*, 1 L. R. Ch. 425. As to correcting a mistake in an enrolled decree, see *King* v. *Chaplin*, 7 W. R. 159; *Fox* v. *Charlton*, 6 N. R. 352; and as to opening a foreclosure after enrolment of the decree, *Ford* v. *Wastell*, 2 Ph. 591; *Thornhill* v. *Manning*, 1 Sim. N. S. 451.

As to cases where no caveat has been entered in consequence of the illness of the solicitor, see *Howell* v. *Evans*, 2 W. R. 608.

The Lords Justices have the same jurisdiction to vacate an enrolment as the Lord Chancellor, *Hill* v. *South Staffordshire Railway Company* (l. c.).

Illness of solicitor.

27. Where a caveat is entered (*c*) with the proper officer to stay the signing of the docket of the enrolment of any decree or order, such caveat shall be prosecuted with effect within twenty-eight days after the docket of such decree or order shall be left to be signed with the proper officer by the party who entered the same: otherwise such caveat shall be of no force, and the docket of such decree or order may immediately after the expiration of the said twenty-eight days be presented to be signed, as if no such caveat had been entered (7th Aug. 1852; 2nd Set, Ord. 4) (*d*).

Rule 27. Caveat against signing docket of enrolment.

(*c*) A caveat must be tendered after the decree has been delivered to the judges' secretary for enrolment and forwarded to the Chancellor for signature, or it will be too late; *Barnes* v. *Wilson*, 1 R. & M. 486; *Ricketts* v. *Martin*, 2 D. F. J. 163; and see *Mann* v. *Ricketts*, 1 Ph. 530, 617.

Proceeding thereon, and time for entering caveat,

(*d*) The signature of the Lord Chancellor to the docket is only *suspended* by the caveat, see *Attorney-General* v. *Conservators of the Thames*, 11 W. R. 408. The appeal must be set down and notice given, and the order for setting down the petition of appeal *served* within the twenty-eight days, *Pearce* v. *Lindsay*, 4 De G. & J. 211; *Dearman* v. *Wych*, 4 M. & Cr. 550; *Stevens* v. *Guppy*, T. & R. 178; *Groom* v. *Stinton*, 2 Ph. 384. As to vacating the enrolment on the ground of surprise on the party intending to appeal, or the illness of their solicitor, &c., see last note.

by setting down appeal, &c.

*28. No enrolment of any decree or order shall be allowed after the expiration of five years from the date thereof (7th Aug. 1852; 2nd Set, Ord. 5). But the Lord Chancellor or the Lords Justices (*e*) shall be at liberty, on motion and notice to all parties (*f*), where it shall appear to him or them under the peculiar circumstances of the case to be just and expedient (*g*) to enlarge that period (7th Aug. 1852; 2nd Set, Ord. 6).

Rule *28. Enrolment within five years. Enlargement of time.

(*e*) See *Cooper* v. *Taylor*, 23 L. T. 263; *Hill* v. *South Staffordshire Railway Company*, 2 D. F. J. 230.

(*f*) These words are new. See *Cookson* v. *Lee*, 1 W. R. 509.

(*g*) Leave to enrol after the five years under this rule is generally required to enable an appeal to be carried to the House of Lords. The Court made an order giving leave to enrol after the five years when the other side had lodged a petition of appeal within that period, which they failed to prosecute (*Cookson* v. *Lee*, 1 W. R. 509; but see *Townley* v. *Decre*, *ibid.* 483), *Horne* v. *Barton*, 8 D. M. G. 587.

Leave to enrol after five years for purpose of *appeal* may be given under special circumstances.

In *Brandon* v. *Brandon*, 7 D. M. G. 365, an obvious error in a decree was

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corrected, notwithstanding a lapse of thirty years (cf. *Cradock* v. *Owen*, 2 Sm. & G. 241, and see *Storre* v. *Benbow*, 1 W. R. 115).

In case of obvious error; but *not* because the law is altered.

But the fact that in the meantime a decision of the House of Lords has been pronounced, which overrules the decree sought to be enrolled, and from which the party applying is consequently desirous of appealing, is not of itself a good ground for inducing the Court to enrol a decree after five years have elapsed (*Wellesley* v. *Wellesley*, 3 De G. & J. 164; 9 H. L. Ca. 525; *Ex parte Mitchell*, 15 W. R. 474). Where an infant party to a suit had obtained his costs upon an understanding that the decree should end all litigation, he was not allowed after a lapse of seven years from the date of the decree, and two from his coming of age, to enrol the decree for the purposes of an appeal, *Moneypenny* v. *Dering*, 4 De G. & J. 175.

In case of interlocutory decree.

Where there had been a mistake in the frame of an *interlocutory decree*, in the absence of which the *final decree* might have been different, an enlargement of time to appeal from the final decree was allowed under the analogous Order XXXI. r. 1, *Buckeridge* v. *Whalley*, 2 N. R. 404; 3 N. R. 179; and see *Walmsley* v. *Foxhall*, 1 De G. J. S. 451. See, too, the observations of the House of Lords in *Beavan* v. *Mornington*, 8 H. L. Ca. 525. It seems that where a party appeals from a final decree, he is not at liberty to question prior interlocutory orders (except such as are inoperative without a subsequent decree), the time for appealing against which has elapsed (*ibid.*).

Questioning prior orders on appeal.

Rule 29. Transmission of enrolment to Public Record Office.

29. As soon as the docket of a decree or order is signed by the Lord Chancellor, for the purpose of enrolment, the *Clerk of Records and Writs* (*h*) shall forthwith *cause* the same *to be* engrossed in the proper form, and *transmit* the same to the Public Record Office, Rolls Yard (*h*) (3rd July, 1676).

(*h*) The words in italics are alterations introduced by Order 7th May, 1866, *post*, which abrogated the rule in the text as it then stood, and re-enacted it as it is now printed in the text. Previously to such alteration the solicitor carried the docket to the Record office.

ORDER XXIV. Receivers.

ORDER XXIV.

RECEIVERS (*a*).

Rule 1. Security for and salaries of receivers.

1. Where an order is made directing a receiver to be appointed, unless otherwise ordered, the person to be appointed shall first give security (*b*), to be allowed by the judge to whose court the cause is attached, and taken before a person authorised to administer oaths in Chancery, duly to account for what he shall receive on account of the rents and profits for the receipt of which he is to be appointed, at such periods as such judge shall appoint, and to account for and pay the same as the Court shall direct, or, as the case may be, to be answerable for what

he shall receive in respect of the personal estate for the getting in and collection of which he is to be appointed, and to account for and pay the same as the Court shall direct. And the person so to be appointed shall be allowed a proper salary for his care and pains in receiving such rents and profits, or, as the case may be, shall have an allowance (*c*) made to him in respect of his collecting such personal estate (16th Oct. 1852; Ord. 13).

ORDER XXIV. Receivers.

(*a*) The word includes a consignee and manager (Prel. Ord. 10 (7)).

Receiver how appointed.

A receiver will, in general, only be appointed on motion after bill filed. (Compare the practice as to injunctions, p. 503, *post*.) But in one case where an infant was interested, a receiver was appointed on petition (*Re Leeming*, 20 L. J. Ch. 550, and see *Re Baron*, cited in Seton, 705; where a receiver was appointed on summons in chambers, and if the parties consent, or the application is to supply the *vacant place of a receiver* already appointed, it may be made *in chambers* (note (*g*), p. 148, *ante*). No appeal to the Court above lies from the appointment of a receiver by a judge in chambers (*Ley* v. *Ley*, 27 L. T. 267).

On application in chambers.

On application of *defendant* only *after decree*.

A receiver cannot be appointed before decree on the motion of a defendant, even though he be the co-executor of the plaintiff, and the bill charges that a receiver is necessary (*Robinson* v. *Hadley*, 11 Beav. 614), nor at the hearing, unless prayed for by the bill (*Barlow* v. *Gains*, 8 Beav. 329). But in *Hiles* v. *Moore*, 15 Beav. 175, a receiver was appointed after decree *on the petition* of a defendant, against his co-defendant, the application being supported by the plaintiff, and a receiver having been specially prayed for by the bill (see, too, *Barlow* v. *Gains*, l.c., and *Edgecombe* v. *Carpenter*, 1 Beav. 171, and note (*a*), p. 503, *post*).

On application of party entitled to undivided share.

The mortgagee of an undivided share may, in a suit of foreclosure and partition, obtain the appointment of a receiver of his undivided share (*Fall* v. *Elkins*, 9 W. R. 861). A receiver of the whole property was granted at the hearing as between tenants in common, there being evidence that the defendant, one of them, had excluded the rest, *Sandford* v. *Ballard*, 33 Beav. 401.

Or of persons claiming by a legal title.

As to the jurisdiction of the Court to appoint a receiver at the instance of persons claiming by a title, which he might enforce at law, or by entering into possession, see *Talbot* v. *Hope Scott*, 4 K. & J. 96, and the authorities there cited, Daniell, 1561; *Sturch* v. *Young*, 5 Beav. 557. See, however, *Acland* v. *Gravener*, 31 Beav. 482; and 23 & 24 Vict. c. 145, s. 17, p. 301, *ante*, under which a first mortgagee may appoint a receiver.

See generally as to the cases in which, and the property over which, a receiver will be appointed, Seton, 1009; Daniell, 1552, 1570.

At what stage of suit.

A receiver will in a proper case be granted before answer (*Duckworth* v. *Trafford*, 18 Ves. 283; *Aberdeen* v. *Chitty*, 3 Y. & Coll. Exch. Ca. 379); and if the circumstances show a case of urgency, before appearance (*Meaden* v. *Sealey*, 6 Hare, 620; *Hart* v. *Tulk*, *ibid.* 611; and see *Tanfield* v. *Irvine*, 2 Russ. 149); in such cases leave to serve notice of motion will be given (*ibid.*). Where the defendant absconded to avoid service, the appointment was made on an *ex parte* motion (*Dowling* v. *Hudson*, 14 Beav. 423, in a note to which all the cases will be found collected). But when the defendant has not absconded, the motion cannot be made *ex parte* (*Caillard* v. *Caillard*, 25 Beav. 512). See further, as to appointing a receiver where the defendant absconds, Ord. XXII. 9, p. 480, *ante*.

When not prayed for by bill.

A receiver, though not specially prayed for by the bill, may be appointed at the hearing (*Osborne* v. *Harvey*, 1 Y. & C. C. C. 166), or after decree (*Bowman* v. *Bell*, 14 Sim. 392; and see *Brooker* v. *Brooker*, 3 Sim. & G. 475, cited *ante*, p. 203; but see *Fallows* v. *Lord Dillon*, 1 W. R. 106); *but not before decree*, *Pare* v. *Clegg*, 9 W. R. 216. A mere defect of parties was not held

ORDER XXIV. Receivers.

sufficient ground for refusing the application, *Re Johnson*, 1 L. R. Ch. 325.

Evidence on.

On application for a receiver, or to discharge an order appointing a receiver, the answer of the defendant is now to be regarded not as conclusive but only as an affidavit of the defendant (15 & 16 Vict. c. 86, s. 59, *ante*, p. 223).

Who may be appointed.

A party to the suit may, by special leave, be appointed receiver (*Davis* v. *Barrett*, 13 L. J. Ch. 304). But he must act without salary, except by express order and by consent (see *Powys* v. *Blagrave*, 18 Jur. 462; *Hoffman* v. *Duncan*, *ibid.* 69; *Baylies* v. *Baylies*, 1 Coll. 548). A practising barrister may be appointed (*Garland* v. *Garland*, 2 Ves. Jun. 137); but not the solicitor in the cause (*ibid.*), nor the solicitor under a commission of lunacy (*Ex parte Pincke*, 2 Meriv. 452), nor the next friend of infant plaintiffs (*Stone* v. *Wishart*, 2 Madd. 64), nor a trustee (*Anon.*, 3 Ves. 515; *Anon* v. *Jolland*, 8 Ves. 72); except in a special case, and without salary (*Sutton* v. *Jones*, 15 Ves. 584; *Sykes* v. *Hastings*, 11 Ves. 363; and see *Banks* v. *Banks*, 14 Jur. 659). A peer will not generally be appointed (*Attorney-General* v. *Gee*, 2 V. & B. 208).

Appointment a matter of discretion.

The granting of a receiver is a matter of discretion, to be governed by a view of the whole circumstances of the case, one of such circumstances being the probability of the plaintiff being ultimately entitled to a decree (*Owen* v. *Homan*, 3 M. & G. 378).

Receiver of property of deceased persons.

Where the validity of a will is disputed, the Court of Probate has now power to appoint an administrator *pendente lite* to be receiver (21 & 22 Vict. c. 77, ss. 70—72). As to the mode of applying for a receiver to protect the property of a deceased person, until a legal personal representative can be appointed, see *Overington* v. *Ward*, 34 Beav. 175, and cases there cited.

Powers of receivers.

As to the powers of a receiver generally, see *De Winton* v. *Mayor, &c. of Brecon*, 26 Beav. 533; Daniell, 1584; Seton, 1015; and for the powers of receivers of railway and other companies, see Seton, 1034; and the late case of *Gardner* v. *London, Chatham, and Dover Railway Company*, 2 L. R. Ch. App. Ca. 223; but see as to railway companies 30 & 31 Vict. c. 127, s. 4, cited note (*c*), p. 356 *ante*.

Allowances for monies expended.

A receiver may, on its being ascertained to be for the benefit of the estate, be entitled to an allowance for money laid out on the estate without previous order (*Tempest* v. *Ord*, 2 Meriv. 55; *Blunt* v. *Clitherow*, 6 Ves. 799; but see *Attorney-General* v. *Vigor*, 11 Ves. 563).

Duty to defend action.

The direction that a receiver shall manage as well as sell and let the estate, authorises him to bring in proposals for ordinary repairs of the buildings on the estate (*Thornhill* v. *Thornhill*, 14 Sim. 600; and see as to the costs, where a receiver, without the express sanction of the Court, defends an action, *Swaby* v. *Dickon*, 5 Sim. 629; *Bristowe* v. *Needham*, 2 Ph. 190; and cf. *De Winton* v. *Mayor of Brecon*, 6 Jur. N. S. 1046).

Defaulting receivers.

As to the jurisdiction of the Court over defaulting receivers, see *Bristowe* v. *Needham*, 11 W. R. 926; *Brandon* v. *Brandon*, 1 Dr. & Sm. 16; and compare *Dixon* v. *Wilkinson*, 4 Drew. 614; 4 De G. & J. 508.

For the mode of compelling a receiver to account, see Daniell, 1590; Seton, 1018; *Whitehead* v. *Lynes*, 34 Beav. 161; on appeal, 12 L. T. N. S. 332, and note to rule 2, *infra*.

Where the receiver died, leaving an unascertained balance, found by the Master's report to be due from him, the Court, *on petition*, ordered his recognizances to be put in suit against his representatives and sureties (*Ludgater* v. *Channell*, 3 M. & G. 175, overruling s. c. 15 Sim. 479).

Receiver appointed for benefit of all parties.

A receiver is appointed for the benefit of all parties (*Faulkner* v. *Daniel*, 3 Hare, 204); and he will not be discharged merely on the application of the party on whose application he was appointed (*ibid. Largan* v. *Bowen*, 1 Sch. & Lef. 296; *Davis* v. *Duke of Marlborough*, 2 Sw. 108); and, on the other hand, all parties are bound by his possession (*Neate* v. *Pink*, 3 M. & G. 476); and if any loss arises from his default the estate must bear it (*Hutchinson* v. *Massarene*, 2 Ball & B. 55). But where the rights of any party to the property have been established, the receiver is to be treated as his receiver (*Boehm* v. *Wood*, T. & R. 345).

The possession of the receiver cannot be disturbed without the leave of the Court, even when he is appointed without prejudice to the rights of persons having prior estates, and when the right to take possession is clear (see *Randfield* v. *Randfield*, 1 Drew. & Sm. 310; *Lane* v. *Sterne*, 3 Giff. 629). But the receiver is not in possession until his recognizances are completed, see *Defries* v. *Creed*, 6 N. R. 17.

Possession of receiver not disturbed without leave of Court.

A receiver being in the position of a *quasi* trustee, he will not be allowed to make interest on the balance in his hands (*Shaw* v. *Rhodes*, 2 Russ. 529; and see *Drever* v. *Maudsley*, 8 Jur. 547; *Earl of Lonsdale* v. *Church*, 3 B. C. C. 41); and will be answerable for the loss of monies with the control of which he has parted, *ex. gr.*, monies deposited in a bank in the name of his sureties (*Salway* v. *Salway*, 2 Russ. & M. 215; on appeal to the House of Lords, 9 Bligh, N. S. 181, sub. nom. *White* v. *Baugh*). So if he remits the money to his own credit at his banker's, and the banker fails (*Wren* v. *Kirton*, 11 Ves. 377). So if he places it in what he knows to be improper hands (*Knight* v. *Lord Plymouth*, 3 Atk. 480). *Secus* if the money be paid to a person apparently solvent at the time for the purpose of its safe transmission (*ibid.*) or for safe custody (see 3 Ves. 566, and *Salway* v. *Salway*, 4 Russ. 60).

Not allowed to make interest on balances in his hands.

For what losses answerable.

(*b*) The security usually required is the recognizance of the receiver together with two sureties for double the amount of the annual income (Seton, 1007; *Mead* v. *Lord Orrery*, 3 Atk. 237). In certain cases a receiver may be appointed on his own recognizances only (*Wilson* v. *Wilson*, 11 Jur. 793), and in some cases without recognizances (see *Bainbrigge* v. *Blair*, 3 Beav. 424; *Manners* v. *Furze*, 11 Beav. 30, and other cases cited in Seton, l. c.). If parties not competent to consent are interested, security must always be given (*Tylee* v. *Tylee*, 17 Beav. 583).

Recognizances.

When dispensed with.

The sureties must be persons resident in England, even where the property to be collected lies out of the country (*Cockburn* v. *Raphael*, 2 S. & S. 453). The sureties are liable for interest as well as the receiver (*Dawson* v. *Raynes*, 2 Russ. 466), and for costs of proceedings against receiver, and to appoint a new one, (*Ex parte Mansell*, 3 J. & Lat. 351; and see *Re Lockey*, 2 Ph. 509). As to the surety's lien on the receiver's property, see *Brandon* v. *Brandon*, 7 W. R. 250.

Who may be sureties.

Their liability.

Their lien.

See for the form of a receiver's recognizance, Appendix, p. lxxii. *post.*

(*c*) The allowance depends on the degree of difficulty or facility with which the rents are collected (*Day* v. *Croft*, 2 Beav. 488). The *maximum* allowance is usually 5*l.* per cent. (Seton, 1006). But for extraordinary trouble and expenses an additional allowance may, by express order, be made to him (*Potts* v. *Leighton*, 15 Ves. 276; *Re Ormsby*, 1 B. & B. 189; *Malcolm* v. *O'Callaghan*, 3 M. & Cr. 52, cited in Seton, 1006).

Salary, allowances, &c.

See note on last page as to allowance for monies expended.

Rule 2. Days for receivers to leave and pass accounts and pay balances.

2. The judge shall fix the days upon which receivers shall (annually, or at longer or shorter periods (*d*), at his discretion) leave and pass their accounts (*e*), and also the days upon which such receivers shall pay the balances appearing due on the accounts so left, or such part thereof as the chief clerk shall certify as proper to be paid by them. And with respect to such receivers as shall neglect to leave and pass their accounts and pay the balances thereof at the times so to be fixed for that purpose as aforesaid, the judge before whom such receivers are to account shall from time to time, when their subsequent accounts are produced to be examined and passed,

Penalties of neglect.

ORDER XXIV. Receivers.

not only disallow the salaries therein claimed by such receivers, but also charge them with interest after the rate of 5*l.* per cent. per annum (*f*) upon the balances so neglected to be paid by them during the time the same shall appear to have remained in the hands of such receivers (see Ord. of 23rd April, 1796, and 63rd Ord. of 3rd April, 1828: and see also 23rd Rule of Ord. XXXV. *infrà*).

Former practice.

(*d*) See, before the rule, *Bertie* v. *Lord Abingdon*, 8 Beav. 53. By the old Order of 1796 the accounts were required to be delivered annually. See Beames' Orders, p. 463.

For forms connected with a receiver's account, see Appendix, pp. lxxiv—lxxix. *post.*

Application to pass accounts, how made.

(*e*) The application that the receiver may pass his accounts is usually made by petition, but it may be by motion (*Re Burke*, 1 B. & B. 74). It may be made though the bill has been dismissed (*Pitt* v. *Bonner*, 5 Sim. 577).

Receiver when charged with interest.

(*f*) A receiver who keeps money in his hands even for a quarter of a year after it ought to have been paid in, will be charged with interest (*Fletcher* v. *Dodd*, 1 Ves. jun. 85). Interest may be charged though the accounts have been settled (*Hicks* v. *Hicks*, 3 Atk. 274; *Fletcher* v. *Dodd*, l. c.); and even though the receiver has been discharged (*Harrison* v. *Boydell*, 6 Sim. 211, where the receiver having failed to pay in his balance was ordered to pay the same and the amount allowed for his salary with interest).

Under the old practice it was held that, unless the objection to the allowance of poundage to the receiver was raised before the Master, the Court would not enter into it (*Ward* v. *Swift*, 8 Hare, 139).

Rate of interest.

Where the default was made by the *executors* of a receiver it was held by V.-C. Knight Bruce that they ought only to be charged with interest at 4*l.* per cent. (*Clements* v. *Beresford*, 10 Jur. 771).

Rule 3. Summons to proceed upon and entry of account.

3. Upon a receiver's account being left in the judge's chambers to be passed, a summons to proceed thereon shall be taken out; and the account, when passed, shall be entered by the solicitor of the receiver in books, in the same manner as heretofore; and the affidavit verifying the account so passed shall refer to it as an exhibit, and not be annexed to it (16th Oct. 1852; Ord. 31).

Rule 4. Deposit of account book.

4. When a receivership has been completed (*g*), the book containing the accounts shall be deposited in the Office of the Clerks of Records and Writs (16th Oct. 1852; Ord. 32).

Application to discharge.

(*g*) The application to discharge the receiver and vacate his recognizances may be by petition or motion, or by consent, by summons in chambers, or the direction may be given in the decree or order on further consideration; and the recognizance will be vacated on a proper affidavit of payment to the party entitled to receive the balance, as well as upon the Accountant-General's certificate. The rule to the contrary, as stated in *Lawson* v. *Ricketts*, 11 Beav. 627, is not now followed (Seton, 1023). A receiver is entitled to the costs of his application to be discharged (*Richardson* v. *Ward*, 6 Madd. 266).

Costs.

ORDER XXV.

ORDER XXV. Injunctions.

INJUNCTIONS (*a*).

No injunction for stay of proceedings at law shall be granted as of course for default of appearance or of answer to the bill (7th Aug. 1852; 1st Set. Ord. 45) (*b*).

No injunctions as of course to stay proceedings at law.

(*a*) An injunction will in general only be awarded on motion of the plaintiff after *a bill specially praying that relief* (*Wood* v. *Beadel*, 3 Sim. 273), and a defendant was not entitled to an injunction against a co-defendant, *Russell* v. *London, Chatham, & Dover Railway Co.*, 4 Giff. 432; but there are exceptions to the rule.

Injunctions awarded *on application of plaintiff* only.

(1) In special cases a defendant may restrain a co-defendant, *Edgecombe* v. *Carpenter*, 1 Beav. 171; *Kingham* v. *Maisey*, 2 Sim. 41; and the rule does not apply if there has been a decree, the subject of which is injured by the act complained of, *e.g.* where a mortgagor after a decree in a foreclosure suit cuts down timber (*Wright* v. *Atkyns*, 1 V. & B. 313). Compare the rule as to receivers, p. 499, *ante*.

Exceptions—(1) *After decree;*

(2) Injunctions may be granted without bill filed under special acts, *e. g.* under the Merchant Shipping Act, *Re the Regatta*, 6 N. R. 248; or as to transfer of stock or shares, under 39 & 40 Geo. 3, c. 36, and 5 Vict. c. 5, *Re East of England Bank*, 6 N. R. 31.

(2) under special acts.

(3) An officer of the court may obtain an injunction without bill where an action is brought against him for damages for illegal acts done in the execution of its process (*Frowd* v. *Lawrence*, 1 J. & W. 655), even when the action seeks damages for the taking of chattels not included in the order of the court (*Walker* v. *Micklethwait*, 1 Drew. & Sm. 49).

(3) In case of officers of court.

An injunction will in general only be awarded against a defendant to a suit, but there are exceptions to this rule, viz. :—

Against defendants only.

1. Where an executor, heir (*Rouse* v. *Jones*, 1 Ph. 462), creditor (*Dyer* v. *Kearsley*, 2 Meriv. 432, note), or legatee (*Ratcliffe* v. *Winch*, 16 Beav. 576), after an administration decree or order, obtains an injunction to restrain a creditor from suing (*Maclaren* v. *Stainton*, 16 Beav. 279). But the injunction will not be granted against a creditor who has recovered judgment (*Fowler* v. *Roberts*, 2 Giff. 226). Where there has been no answer the injunction will in these cases only be granted on an affidavit by the executor as to the assets in his hand (*Gilpin* v. *Lady Southampton*, 18 Ves. 469; and see *Drewry* v. *Thacker*, 3 Swanst. 546; *Clarke* v. *Earl of Ormond*, Jac. 108, 125), or on an admission of assets (*Lawton* v. *Lawton*, 8 W. R. 458). And the Court will take care to secure the fund by payment into court or other proper directions (*Clarke* v. *Earl of Ormond*, Jac. 108). For form of order see *Canham* v. *Neale*, 26 Beav. 266; *Mosely* v. *Mosely*, 4 L. T. N. S. 239. The creditor is entitled to his costs up to notice of decree, and generally to his costs of the motion (*Jones* v. *Jones*, 5 Sim. 678; *Cole* v. *Burgess*, Kay, App. 1; but see, *contra*, *Lawton* v. *Lawton*, *ante*, and *Gardner* v. *Garrett*, 20 Beav. 469).

Exceptions—(1.) Executor may restrain *creditor* after decree.

2. Where plaintiff is suing at law and in equity for the same thing, see Ord. XLI. 5, and note.

(2.) Plaintiff suing at law and in equity may be restrained.

Injunctions may be divided into two general heads: injunctions to restrain proceedings in other courts, and injunctions to restrain wrongful acts of a special nature.

INJUNCTIONS.

I. Injunctions of the former kind most frequently applied for are injunctions to stay proceedings at law, formerly called common injunctions (see note to 15 & 16 Vict. c. 86, s. 58, *ante*, p. 221). It would be out of place to treat here of the grounds on which a Court of Equity will interfere to grant this injunction, which are in fact nearly commensurate with the grounds of equitable relief generally. It may be useful to remark, however, that the Court may not only in a proper case interfere to restrain trial or execution at law (see, as

(I.) Restraining proceedings in other courts;

ORDER XXV. Injunctions.

to this, *Turner* v. *Wright*, 1 J. & W. 290; *Williams* v. *Roberts*, 8 Hare, 315), but even *after execution* to stay money in the hands of the sheriff, or delivery of possession. See authorities cited in Daniell, 1472, and notes to *Earl of Oxford's case*, in 2 W. & T. Leading Cases.

Restraining proceedings in common law courts,

A Court of Equity will restrain proceedings in the Admiralty Courts when the defence (*ex. gr.* that of a bottomry bond being obtained by fraud) cannot be made available in the latter (*Glascott* v. *Lang*, 3 M. & Cr. 451; *Duncan* v. *M'Calmont*, 3 Beav. 409); in the Court of Probate, where any questions peculiarly cognizable by Courts of Equity, *e. g.*, a trust, a wife's equity to a settlement (*Meals* v. *Meals*, 1 Dick. 373), or an infant's legacy (*Horrell* v. *Waldron*, 1 Vern. 26), are involved. See, as to restraining proceedings in the Insolvent or Bankruptcy Courts, *Attwood* v. *Banks*, 2 Beav. 192; *Perry* v. *Walker*, 1 Y. & Coll. C. C. 672.

where equitable defence could not be raised.

In all these cases the ground upon which Courts of Equity proceed is that there are substantial grounds of defence to the proceedings commenced of which the Court in which they are pending cannot take cognizance, or which, for want of the power of such Courts to compel discovery, cannot be properly raised.

Whether the injunction will be granted generally, or until answer, depends upon the ground on which it is sought.

As to a plaintiff's right to bring his bill to a hearing after injunction, see *Mayhew* v. *Maxwell*, 3 L. T. N. S. 847; and as to *interim* injunction till hearing, *Coleman* v. *West Hartlepool Company*, 3 L. T. N. S. 847; and see *Ooddeen* v. *Oakley*, 2 D. F. J. 158.

See generally as to the "common injunction," p. 221, *ante*.

Restraining wrongful acts

II. The cases in which the Court will interfere to restrain wrongful acts of a special nature may be classified under the following heads:—

1. Breaches of contract or trust, in which case the injunction will be granted irrespectively of damage (*Tipping* v. *Eckersley*, 2 K. & J. 254).

as to copyright or patent;

2. Infringement of copyright or patent right. Such injunctions will now be granted on a *primâ facie* title being shown. See, as to the affidavits and evidence necessary to support each *primâ facie* title, *Mayer* v. *Spence*, 1 J. & H. 87; and see as to copyright the late case of *Scott* v. *Stanford*, 3 L. R. Eq. 718.

trade marks;

3. Counterfeiting trade marks or colorable imitations calculated to mislead the public (*Shrimpton* v. *Saight*, 18 Beav. 164; and see *Seixo* v. *Provezende*, 1 L. R. Ch. 192); unless arising from the necessity of the case (*Taylor* v. *Taylor*, 10 Hare, 475).

ancient lights;

4. Obstruction of ancient lights, or lights derived from a common landlord (*Davies* v. *Marshall*, 9 W. R. 368; 1 Drew. & Sm. 557, 564; *Gale* v. *Abbot*, 10 W. R. 748); or alteration of windows so as to enlarge easement already acquired (*Cooper* v. *Hubbuck*, 30 Beav. 160; and see *Renshaw* v. *Bean*, 18 Q. B. 113; *Townend* v. *Wilson*, 9 W. R. 30, there cited); and as to light and air generally, see *Clarke* v. *Clark*, 1 L. R. Ch. 16; *Yates* v. *Jack*, *ibid.* 295.

waste and trespass;

5. Waste and trespass (see Daniell, 1478, and notes to *Garth* v. *Cotton*, in 1 W. & T. Leading Cases). And as to the amount of damage necessary to be shown, see *Wintle* v. *Bristol Railway Company*, 10 W. R. 210; *Holyoake* v. *Shrewsbury and Birmingham Railway Company*, 5 Rly. Ca. 421; *London and North Western Railway Company* v. *Lancashire and Yorkshire Railway Company*, 4 L. R. Eq. 174.

nuisance;

6. Nuisance either of a public nature, in which case an information must be filed, or of a private nature (see *Att.-Gen.* v. *Nichol*, 16 Ves. 342; *White* v. *Cohen*, 1 Drew, 312). And as to form of order, see *Lingwood* v. *Stowmarket Company*, 1 L. R. Eq. 77, 336.

removal of property;

7. Alienation, or, in some cases, removal out of the jurisdiction of property attended by gross or irremediable injustice (Daniell, 1493; and see *Dyke* v. *Taylor*, 9 W. R. 403).

8. Setting up of legal bars.

interpleader suits.

9. In interpleader suits, as to which see Daniell, 1418, 1422. In such cases the injunction will only be granted on an affidavit of no collusion, annexed to or filed with (*Jones* v. *Shepherd*, 29 Beav. 293; *Shepherd* v. *Jones*, 3 De G. F. & J. 56) the bill, and on payment of the rent (*Townley* v. *Deare*, 3 Beav. 213) or money (*Pauli* v. *Von Melle*, 8 Sim. 326) in dispute into court.

10. Bills of peace.

Leave may be given (on *ex parte* motion) to serve the notice of motion *with the bill*, but not before the bill is filed (*Simmons* v. *Heaviside*, 23 Beav. 412; see, *contrà*, *Fosbrooke* v. *Woodcock*, 12 Jur. 956, where the subpœna had issued under the old practice). The leave should be stated in the notice (*Hill* v. *Rimell*, 2 M. & Cr. 641). Leave to serve notice of motion before the expiration of the time limited for defendant's appearance does not *necessarily* include leave to give shorter notice than is usually required (as to which see Ord. XXXIII. r. 2; *Hart* v. *Tulk*, 6 Hare, 611). Leave to give early notice of motion for injunction.

When the defendant has once appeared to the bill he ought strictly to be served with notice of the motion (see *Langham* v. *Great Northern Railway Company*, 1 De G. & Sm. 486; and *Perry* v. *Weller*, 3 Russ. 519; *Collard* v. *Cooper*, 6 Madd. 190; *Marasco* v. *Borton*, 2 Ves. sen. 112, cited in note to 1 Rus. & M. 321; and comp. note (*a*) p. 530, *post*); but such service is dispensed with "where the threatened mischief is imminent, and would be irremediable" (see reporter's note to the last cited case, and Lord Eldon's *dictum*, in 3 Br. C. C. 477, note; and *Allard* v. *Jones*, 15 Ves. 605; *Acraman* v. *Bristol Dock Company*, 1 R. & M. 321). Or to move without notice.

The 25 & 26 Vict. c. 42, requiring the Court to give complete relief where it gives any, does not interfere with the practice of granting interim injunctions, *Davenport* v. *Jepson*, 1 N. R. 173. Interim or ex parte injunctions.

In cases of waste or immediate urgency an *ex parte* injunction or an *interim* restraining order may be obtained. But such an application must be made without laches, delay in asking for injunctions being regarded by the Court with more than ordinary jealousy (*Wintle* v. *Bristol Railway Company*, 10 W. R. 210).

Generally, a plaintiff obtaining an *interim* order will have to give an undertaking as to damages, *Adamson* v. *Wilson*, 10 L. T. N. S. 24; *Chappell* v. *Davidson*, 8 D. M. G. 1; especially since the passing of Lord Cairns' Act, *ante*, p. 261, *Tuck* v. *Silver*, Johns. 218; and see *Wakefield* v. *Duke of Buccleugh*, 13 W. R. 856. And it seems that it makes no difference that the plaintiff's right to an injunction till the hearing is clear, *Tuck* v. *Silver* (l. c.); but see *Ingram* v. *Stiff*, cited in note, Johns. 220. Undertaking as to damages.

The plaintiff being abroad his counsel entered into the undertaking, *Hamilton* v. *Board*, 1 N. R. 379; and a company being plaintiff, some responsible person was required to enter into the undertaking, *Anglo-Danubian Company* v. *Rogerson*, 10 Jur. N. S. 87. Who may give the undertaking.

The dismissal of the bill does not affect the ultimate decision as to the damages to be paid under an undertaking given when the *interim* injunction was obtained (*Newby* v. *Harrison*, 3 D. F. J. 237, overruling s. c. 1 J. & H. 678, and see the cases there cited). But where a plaintiff had obtained an injunction *ex parte* in the usual undertaking to be answerable in damages, and after the injunction had been dissolved, the defendant moved to dismiss the bill for want of prosecution, and for an inquiry as to damages, the Court made the usual order to file replication, or else that the bill should be dismissed, but refused in that stage of the proceedings to direct an inquiry as to damages, *Southwood* v. *Tayler*, 28 Beav. 610. When Court will direct inquiry as to damages though bill dismissed.

The undertaking does not extend to damages which result not from the injunction but collaterally from the suit, *Bingley* v. *Marshall*, 11 W. R. 1018.

Unless the plaintiff when he obtained the *ex parte* injunction, disclosed all material facts, either the injunction will be dissolved, *Hilton* v. *Earl Granville*, 4 Beav. 130, or at any rate the plaintiff will have to pay the costs, *Fuller* v. *Taylor*, 11 W. R. 532; *Holden* v. *Waterloo*, 15 W. R. 139; see *Fitch* v. *Rotchfort*, 18 L. J. Ch. 458. Concealment of material facts.

A plaintiff cannot obtain an injunction pending a plea (*Humphreys* v. *Humphreys*, 3 P. Wms. 395) or a demurrer (*Cousins* v. *Smith*, 13 Ves. 164; and see *Anon.* v. *Bridgewater Canal Company*, 9 Sim. 378, as to setting down the demurrer in such cases), or after a bill has been found to contain scandalous matter (*Davenport* v. *Davenport*, 6 Madd. 251). Injunction pending plea, demurrer, &c.

A successful demurrer to the whole bill puts an end to an injunction previously obtained, even though leave be given to amend (*Schneider* v. *Lizardi*, 9 Beav. 461). Effect of demurrer on injunction.

ORDER XXV. Injunctions.

A plaintiff may move for an injunction during the long vacation.

During vacation.

A plaintiff's right to an injunction at the hearing is not necessarily prejudiced by his omitting to apply for it at an earlier stage of the cause (*Davies* v. *Marshall*, 1 Drew. & Sm. 557, 564, but see observations of V.-C. Wood in *Betts* v. *Clifford*, 1 J. & H. 77).

Effect of abatement on injunction.

As to the effect of the amendment of the bill on a notice of motion for injunction, or on an injunction already obtained, see note (*j*), p. 410, *ante*.

The abatement of a suit does not of itself dissolve an injunction (see *Hill* v. *Hoare*, 2 Cox, 50; *Stuart* v. *Ansell*, 1 Cox, 411; and Ord. XXXII. 4, and notes).

Evidence on motion for injunction.

As to the evidence by which a motion for or to dissolve an injunction may be supported, see 15 & 16 Vict. c. 86, ss. 39, 40; and note (*a*), p. 463, *ante*.

The answer of the defendant is to be treated as an affidavit, both on motions for and on motions to dissolve an injunction (15 & 16 Vict. c. 86, s. 59, *ante*, p. 223).

Effect of giving notice of injunction before order drawn up.

In pressing cases the plaintiff may, before the order has been drawn up, give the defendant notice of the fact that it has been obtained, and if there is no delay in getting the order drawn up, sealed, and served, the defendant may be committed for a breach after such notice (*Vansandau* v. *Rose*, 2 J. & W. 264; *Kimpton* v. *Eve*, 2 V. & B. 349; *Lewes* v. *Morgan*, 5 Price's Exch. Rep. 518; and see *Gooch* v. *Marshall*, *ante*, p. 472). The injunction operates from the date of the order (*Rattray* v. *Bishop*, 3 Madd. 220). The copy of the injunction must be served personally (note (*i*), p. 490; *Ellerton* v. *Thirsk*, 1 J. & W. 376).

Plaintiff's rights in case of breach.

After breach the plaintiff may move either that the defendant be at once committed, or that he may be committed unless he show cause to the contrary. In the first case, the service of notice of motion (*Angerstein* v. *Hunt*, 6 Ves. 488); in the second case, the service of the order *nisi* (*Durant* v. *Moore*, 2 R. & M. 33, 34) must be personal, unless it be satisfactorily made out that he is purposely keeping out of the way, in which case substituted service may be permitted (*Pulteney* v. *Shelton*, 5 Ves. 147; see note (*b*), p. 419).

The order for committal must state the affidavit of service of the injunction, and either the affidavit of service of the notice of motion for committal, or the appearance of counsel on the motion, *Stephens* v. *Workman*, 1 N. R. 563.

Motion to dissolve.

If an injunction is improperly obtained, the party restrained should move to dissolve it (*Woodward* v. *Earl of Lincoln*, 3 Swanst. 626). He cannot safely treat it as nullity (*ibid.*). See note (*c*), p. 395, *ante*, note (*a*), p. 529, *post*.

Dissolution where several defendants to a bill of discovery.

Where a joint action at law has been commenced by several persons, who are all made defendants to a bill in equity for discovery, the Court will not dissolve the injunction till all have answered. (*Joseph* v. *Doubleday*, 1 V. & B. 497; *White* v. *Steinwacks*, 19 Ves. 83).

(*b*) See notes to 15 & 16 Vict. c. 86, s. 58, p. 221, *ante*.

ORDER XXVI. Stop Orders.

ORDER XXVI.

STOP ORDERS (*a*).

Rule 1. Costs occasioned by stop orders.

1. Where any stocks, funds, shares, securities, or monies are standing in the name of the Accountant-General in trust in or to the general credit of any cause or matter, or to the account of any class of persons, and an order is made to prevent the transfer or payment of such stocks, funds, shares, securities, or monies, or

any part thereof, without notice to the assignee of any person entitled in expectancy or otherwise to any share or portion of such stock, funds, shares, securities, or monies, the person by whom any such order shall be obtained, or the shares of such stocks, funds, shares, securities, or monies affected by such order, shall be liable at the discretion of the Court or the judge at chambers, as the case may be, to pay any costs, charges, and expenses, which, by reason of any such order having been obtained, shall be occasioned to any party to the cause or matter, or any persons interested in any such stocks, funds, shares, securities, or monies (3rd April, 1841) (*a*).

(*a*) In cases where the assignor and assignee concur (see *Lister* v. *Tidd*, 15 W. R. 917), a stop order must be taken at chambers (*Edmonson* v. *Harrison*, 1 W. R. 140), see p. 147. If the assignor does not concur, the application should be by petition (Seton, 953, and see *Re Miller*, 6 W. R. 238; *Re Nowell*, 11 W. R. 896). Mode of obtaining stop orders.

A stop order has priority even over a charging order in aid of a decree under 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1, as to which, see p. 3, *ante*; and see generally as to the effect of a stop order, *Tidd* v. *Lister*, 15 W. R. 975; and as to its giving no priority over other charges, *Warburton* v. *Hill*, Kay, 470; *Greening* v. *Beckford*, 5 Sim. 195; *Re Blunt*, cited p. 71, *ante*; *Swayne* v. *Swayne*, 11 Beav. 463; *Hulkes* v. *Day*, 10 Sim. 41. "By granting a stop order the Court decides nothing as to the rights of the parties" (per Lord Langdale, in *Lucas* v. *Peacock*, 9 Beav. 118; *Hawkesly* v. *Gowan*, 12 W. R. 1100; and see *Re Blunt*, cited p. 71 (*ad finem*), *ante*).

In *Re Duke of Cleveland's Harte estates*, January 17, 1862, V.-C. Kindersley granted a prospective stop order, restraining the payment of funds hereafter to be paid in to a particular account; but V.-C. Kindersley refused to make such a prospective order where there was no certainty that any fund would be brought into court, *Wellesley* v. *Mornington*, 11 W. R. 17. The operation of the order, though general in terms, is confined to the amount on which the order was founded, *Macleod* v. *Buchanan*, 33 Beav. 234. Prospective order.

The order for payment out of a fund in court of the claims of an incumbrancer who has obtained a stop order should include the costs of obtaining the stop order (*Waddilove* v. *Taylor*, 6 Hare, 307), for if it does not do so they will be disallowed (*ibid.*). Costs of payment out after stop order.

A mortgagee who, after notice that the parties entitled to a distributable fund in court had presented a petition for payment to him and them of the funds, applied for a stop order, was refused his costs of the application (*Hoole* v. *Roberts*, 12 Jur. 108). See, further, as to the costs of a stop order and the appearance of persons who have obtained one, *Grimsby* v. *Webster*, 8 W. R. 725; *Edwards* v. *Grove*, 29 L. J. Ch. 839. Of unnecessary stop order.

Rule *2. Service of petition, &c., for stop order.

*2. Any person presenting a petition or taking out a summons for any such order as aforesaid shall not be required to serve such petition or summons upon the parties to the cause (*b*), or upon the persons interested in such

ORDER XXVI. Stop Orders.

parts of the stocks, funds, shares, securities, or monies, as are not sought to be affected by any such order (3rd April, 1841) (*c*).

Service on assignor.

(*b*) This rule does not dispense with the necessity of serving the assignor, though a party to the cause (*Parsons* v. *Groome*, 4 Beav. 521). But where not only the assignor but the other parties to the cause were served, the petitioner was ordered to pay the costs of the latter (*Glazbrook* v. *Gillatt*, 9 Beav. 611).

What evidence necessary under this rule.

(*c*) "Two things are necessary under this General Order. First, you must show, generally, the title of the assignor; but it is not absolutely necessary to show the particular share of the fund to which he is entitled. Secondly, you must show the assignment either by proving its execution in the usual way, or by the assignor's appearing and admitting it" (per Lord Langdale in *Wood* v. *Vincent*, 4 Beav. 419; and see *Quarman* v. *Williams*, 5 Beav. 133, and cases cited in the reporter's note).

ORDER XXVII. Distringas.

ORDER XXVII.

DISTRINGAS (*a*).

Rule 1. Form of writ of distringas.

1. Any person claiming to be interested in any stock transferable at the Bank, standing in the name of any other person or body politic or corporate, in the books of the Governor and Company of the Bank, may, by his solicitor, prepare a writ of distringas (*b*) pursuant to the Stat. 5 Vict. c. 5, in the form set out in the first Schedule to the said Act (*c*), and may present the same for sealing at the Office of the Clerks of Records and Writs (17th Nov. 1841; Ord. 1).

(*a*) If a judgment (which includes decrees in equity) has been entered up against any person, the judgment creditor may apply for a charging order on stock and shares, which, after notice to the bank or company, is to operate as a *distringas*, 1 & 2 Vict. c. 110, ss. 14, 15, *ante*, p. 3.

5 Vict. c. 5, s. 5.

(*b*) The 5th section of the 5th Vict. c. 5, enacts, "That in the place and stead of the writ of distringas, as the same has been heretofore issued from the said Court of Exchequer, a writ of distringas in the form set out in the first schedule to this Act shall, on and after the said 15th day of October, 1841, be issuable from the Court of Chancery, and shall be sealed at the Subpœna Office, and that the force and effect of such writ, and the practice under or relating to the same, shall be such as is now in force in the said Court of Exchequer: Provided, nevertheless, that such writ, and the practice under or relating to the same, and the fees and allowances in respect thereof, shall be subject to such orders and regulations as may, under the provisions of this Act, or of any other Act now in force, or under the general authority of the Court of Chancery, be made with reference to the proceedings and practice of the said Court of Chancery."

Party who has obtained distringas may

See, before the rule, *Ex parte Field*, 1 Y. & C. C. C. 1. The fact that a party has obtained a distringas under the 5th section does not prevent him from applying for an injunction under the 4th section of the Act (*Re Marquis*

of Hertford, 1 Ph. 129 ; and see *Ex parte Amyot*, cited in the notes to that case). But the order will not be indefinitely continued if no bill be filed (s. c. 1 Hare, 584) ; though the filing of a bill does not necessarily discharge the writ (s. c. 1 Ph. 203).

apply for injunction.

(*c*) The writ is as follows :—"VICTORIA, &c. To the Sheriff of London, greeting : We command you that you omit not by reason of any liberty, but that you enter the same, and distrain the Governor and Company of the Bank of England by all their lands and chattels in your bailiwick, so that they, or any of them, do not intermeddle therewith until we otherwise command you ; and that you answer us the issues of the said lands, so that they do appear before us in our High Court of Chancery on the ——— day of ———, to answer a certain bill of complaint lately exhibited against them and other defendants, before us in our said Court of Chancery, by ———, complainant, and further to do and receive what our said Court shall then and there order in the premises, and that you then leave there this writ. Witness, &c.

"ROMILLY, M.R."

Form of writ.

Rule 2. Sealing of writ.

2. Upon the presentment of such writ for sealing, and on leaving with the Clerks of Records and Writs an affidavit, duly sworn by the person or one of the persons applying for such writ or his solicitor before some person authorised to administer oaths in Chancery, in the form set out at the end of this Rule, the same writ shall (in conformity with the 37th Rule of Order I.) be forthwith sealed with the seal of the Office of the Clerks of Records and Writs, and such writ, when sealed, shall have the same force and validity as the writ of distringas formerly issued out of the Court of Exchequer (17th Nov. 1841 ; Ord. 2. 10th Dec. 1841) (*c*).

Force of writ.

Form of Affidavit.

"A. B. [*the name of the person or persons in whose behalf the writ is sued out*] *v.* The Governor and Company of the Bank of England.

"I, ——, of —— do solemnly swear, that, according to the best of my knowledge, information, and belief, I am [*or, if the affidavit is made by the solicitor*, A. B., of —— is] beneficially interested in the stock hereinafter particularly described, that is to say" [*here specify the amount of the stock to be affected by the writ, and the name or names of the person or persons, or body politic or corporate, in whose name or names the same shall be standing*].

(*c*) Where a distringas was obtained, accompanied by an affidavit of the person obtaining it, that he was personally interested in a particular sum of

Discharging distringas

ORDER XXVII. Distringas.

obtained by mistake.

stock standing in the name of A., and the writ was afterwards applied to another sum of stock, standing in the name of B., the practice of the Bank not being to look at the affidavit, it was held that on the bankruptcy of the person who had obtained it, it might be discharged with costs without serving his assignees (*Re Cross*, 10 W. R. 53).

Rule 3. Discharge of writ.

3. Such writ of distringas, and all process thereunder, may at any time be discharged by an order, to be obtained as of course upon the petition of the person on whose behalf the writ was issued, or to be obtained upon the application, by motion on notice or by petition duly served, of any other person claiming to be interested in the stock sought to be affected by such writ. And upon or after such application, such costs thereof and in relation thereto and to the said writ as to the Court shall seem just, may, if the Court shall think fit, be awarded, and ordered to be paid by the person on whose behalf the writ was issued, or, upon an application by any other person, by such person (17th Nov. 1841; Ord. 3).

Rule 4. Bank not to be authorised to refuse transfer, or withhold payment of dividends for eight days after request to transfer, &c.

4. Where the Governor and Company of the Bank, after having been served with such writ of distringas, and a notice not to permit the transfer of the stock in such notice and in the said affidavit specified, or not to pay the dividends thereon, receive a request from the person in whose name such stock is standing, or some person on his behalf or representing him, to allow such transfer, or to pay such dividends, the said Governor and Company shall not, by force or in consequence of such distringas, be authorised, without the order of the Court, to refuse to permit such transfer to be made or to withhold payment of such dividends for more than eight days after the date of such request (17th Nov. 1841; Ord. 4).

ORDER XXVIII. Subpœnas.

ORDER XXVIII.

SUBPŒNAS.

Rule 1. Præcipe.

1. Where it is intended to sue out a *subpœna* (*a*), a *præcipe* for that purpose, in the usual form (*b*), and containing the name or firm and the place of business or

residence of the solicitor or solicitors intending to sue out the same, and where such solicitor or solicitors is or are agent or agents only, then also the name or firm and place of business or residence of the principal solicitor or solicitors, shall in all cases be delivered and filed at the Office of the Clerks of Records and Writs. And on a *subpœna* for costs being sealed, the Taxing Master's certificate shall be produced to the officer sealing the writ as his authority for sealing it (21st Dec. 1833; Ord. 2 and 3).

(*a*) As to service of subpœnas, see rule 6, *infra*.

Irregularities in subpœna.

As to irregularities in a subpœna and the consequences thereof, see *Lord Huntingtower* v. *Sherborn*, 5 Beav. 162; *Barnes* v. *Tweadale*, C. P. C. 440; *Powell* v. *Martin*, 1 J. & W. 292; *Johnson* v. *Barnes*, 1 De G. & Sm. 129; *Carvick* v. *Young*, Jac. 524; *Oldfield* v. *Cobbett*, 12 Beav. 92; and as to service of a subpœna on witnesses, *Keymer* v. *Pering*, 10 Sim. 179; *Brook* v. *Biddall*, 23 L. J. Ch. 696; *Spicer* v. *Dawson*, 22 Beav. 282; *Hope* v. *Liddell*, 20 Beav. 438.

Affidavit of service when plaintiff makes default at hearing.

(*b*) When the defendant makes default at the hearing, the affidavit of service of the subpœna to hear judgment must verify the fact of the indorsement being as required by the order (*Rigg* v. *Wall*, 3 M. & C. 505); but see note (*b*), p. 491, *ante*. By the old Order, the name of the solicitor was required to be *indorsed* (Beav. Ord. Canc. p. 43).

Rule 2. Form of writ of subpœna.

2. Writs of *subpœna* shall be in the forms mentioned in Schedule (E), with such alterations and variations as circumstances may require (8th May, 1845; Ord. 24) (*c*).

(*c*) See Appendix, p. v. And as to subpœnas for costs, see Morg. & Dav. 363; for documents, see *ante*, pp. 174, 193; to hear judgment, *ante*, p. 470.

Rule 3. Number of persons in a subpœna other than subpœna duces tecum.

3. Every *subpœna*, other than a *subpœna duces tecum*, shall contain three names, where necessary or required (21st Dec. 1833; Ord. 5).

Rule 4. In subpœna duces tecum.

4. No more than three persons shall be included in one *subpœna duces tecum;* and the party suing out the same shall be at liberty to sue out a *subpœna* for each person, if it shall be deemed necessary or desirable (21st Dec. 1833; Ord. 6).

Rule 5. Alteration of subpœnas.

5. In the interval between the suing out and service of any *subpœna*, the party suing out the same may correct any error in the names of parties or witnesses, and may have the writ re-sealed upon leaving a corrected *præcipe* of such *subpœna*, marked with the words "altered and

ORDER XXVIII. Subpœnas.

re-sealed," and signed with the name and address of the solicitor or solicitors suing out the same (8th May, 1845; Ord. 25).

Rule 6. Service of subpœna.

6. The service of *subpœnas* (*d*) shall be effected by delivering a copy of the writ and of the indorsement thereon, and at the same time producing the original writ (21st Dec. 1833; Ord. 4).

Service of subpœna on persons out of jurisdiction.

(*d*) The service of a subpœna for costs authorises the party serving it to receive the money without a power of attorney (*Empringham* v. *Short*, 12 L. J. Ch. 144).

Service out of the jurisdiction of a *subpœna for costs* is irregular (*Fernandez* v. *Corbin*, 2 Sim. 544; *Hawkins* v. *Hall*, 1 Beav. 73; and see s. c. 4 M. & Cr. 280).

Substituted service.

"Substituted service of the subpœna for costs" may be allowed (see p. 419), if after due diligence to serve the party personally he cannot be found, *Danford* v. *Cameron*, 8 Hare, 329; *Hunter* v. *Anon.*, 6 Sim. 429; *Inglis* v. *Campbell*, 2 W. R. 667; or if the party is residing permanently abroad, *Walrond* v. *Parker*, 1 Giff. 315; *Hawkins* v. *Hall*, 1 Beav. 73, 4 M. & Cr. 280.

Rule 7. Service of subpœna to hear judgment.

7. Service upon a defendant's solicitor of a *subpœna* to hear judgment shall be deemed good service upon such defendant (8th May, 1845; Ord. 26) (*e*).

Affidavit of service.

(*e*) If the solicitor served is the solicitor on the record, the affidavit of service of the subpœna need only state that "according to the information and belief of the deponent," he is the solicitor of the defendant (*Marsden* v. *Blundell*, 20 L. J. Ch. 104). The affidavit need not state the place where the party was served (*Re Job*, 27 Beav. 32). As to subpœna to hear judgment, see *ante*, p. 470.

Rule 8. Affidavits to prove service.

8. Affidavits filed for the purpose of proving the service of a *subpœna* upon any defendant, must state when, where, and how such *subpœna* was served, and by whom such service was effected (8th May, 1845; Ord. 34).

Rule 9. Time for service.

9. The service of any *subpœna*, except a *subpœna* for costs, shall be of no validity if not made within twelve weeks after the *teste* of the writ (8th May, 1845; Ord. 16, Art. 1) (*f*).

(*f*) See *Lord Huntingtower* v. *Sherborn*, 5 Beav. 162.

Rule 10. Practice as to subpœnas to appear to, &c., bills filed on or before 1st Nov. 1852.

10. The practice of the Court existing on the 1st day of Nov. 1852, with reference to issuing and serving writs of *subpœna* to appear to and answer bills, shall continue in force with respect to bills filed on or before that day (7th Aug. 1852; 1st Set. Ord. 13).

ORDER XXIX.

ORDER XXIX. Process to enforce Decrees and Orders.

PROCESS TO ENFORCE DECREES AND ORDERS (*a*).

Rule *1. No demand necessary when decree, &c., directs money to be paid or property to be transferred or delivered up.

*1. Where any person is by any decree or order directed to pay any money or deliver up or transfer any property real or personal to another, it shall not be necessary to make any demand thereof; but the person so directed shall be bound to obey such decree or order, upon being duly served (*a*) with the same, without demand; and process of contempt may issue accordingly to enforce performance thereof (30th March, 1859; Ord. 17) (*b*).

(*a*) Before process can issue the decree must be served with the proper indorsement, Ord. XXIII. 10 (p. 489, *ante*.) *Process of contempt.*

As to decrees of Courts of Equity having the effect of judgments and operating as a charge on real estate, and as to charging orders on stock, &c., see 1 & 2 Vict. c. 110, s. 18 (p. 6, *ante*). Decree must be served.

An order of the House of Lords affirming an order of the Court of Chancery, was on an *ex parte* application made an order of the Court, as it could not otherwise be enforced while the House was not sitting, *Wentworth* v. *Lloyd*, 13 W. R. 146; see p. 139, *ante*. Decree a charge on land. Decree of House of Lords.

As to the course for obtaining damages on account of *abuse of the process* of the Court, see *Whitehead* v. *Lynes*, 34 Beav. 165; *Goucher* v. *Clayton*, 14 L. T. N. S. 494; *Fielden* v. *Northern Railway of Buenos Ayres Company*, 2 W. N. (1867), 218; but as to injunctions to restrain actions against an officer of the court, see note (*a*), p. 503, *ante*. Abuse of process of Court.

(*b*) The process of contempt may issue at once, see Ayckb. 233; Seton, 1214, 1240; *Re Belton*, 25 Beav. 368; *Re Bowen*, 11 W. R. 607. Process issued at once.

Rule 2. Process by or against persons not parties to cause.

2. Every person, not being a party in any cause, who obtains an order, or in whose favour an order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the cause. And every person, not being a party in any cause (*c*), against whom obedience to any order may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party to the cause (26th Aug. 1841; Ord. 15).

(*c*) Orders made in the taxing-master's office can be enforced by attachment, see note (*l*), p. 27, *ante*.

I. *Attachment, Serjeant-at-Arms, and Sequestration (d).*

Rule 3. Enforcing decrees and orders.

3. Where any person is by a decree or order made in any suit or matter directed to pay money or to do any other act in a limited time, and, after due service of such

ORDER XXIX. Process to enforce Decrees and Orders.

decree or order, refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such decree or order shall, at the expiration of the time limited for the performance thereof, be entitled to a writ or writs of attachment against the disobedient person. And in case such person shall be taken or detained in custody under any such writ of attachment without obeying the same decree or order, then the person prosecuting the same decree or order shall, upon the sheriff's return that the disobedient person has been so taken or detained, be entitled to a commission of sequestration (*e*) against his estate and effects. And in case the sheriff shall make the return *non est inventus* to such writ or writs of attachment, the person prosecuting such decree or order shall be entitled at his option either to a commission of sequestration (*e*) in the first instance, or otherwise to an order for the serjeant-at-arms, and to such other process as he was formerly entitled to upon a return *non est inventus* made by the commissioners named in a commission of rebellion issued for the non-performance of a decree or order (*f*) (Ord. of 18th July, 1857, amending 11th Ord. of 11th April, 1842).

Attachment.

Sequestration.

Serjeant-at-arms.

Writ of attachment when and how issued.

(*d*) A writ of *attachment* issues *generally without any order*, against persons in contempt, either for non-compliance with orders of the Court (as in the text), or for other reasons, see Ord. XLII. 1, p. 609, *post;* but a *special order* should be obtained to attach a defendant for *want of answer* (p. 433, *ante*).

Indorsement.

The indorsement on the writ expresses the object of it, and a time is limited for the sheriff to make his return, fifteen days if the party in contempt resides more than twenty miles from London, see *Zulueta* v. *Vincent*, 15 Beav. 273, otherwise it is now (by 1 Will. 4, c. 36, s. 15, r. 3), returnable immediately; and see Daniell, 421; *Wroe* v. *Clayton*, 16 Sim. 183.

When *returnable* immediately.

As to affidavits in support of attachments, see *Gardner* v. *Rose*, 4 Russ. 578.

Affidavit in support.

Execution and *return* of writ.

(1) "Non est inventus."

(2) Imprisonment.

(3) Bail.

Contempt not bailable.

The writ is executed by the sheriff of the county into which it issues; but if he cannot find the person named in the writ, he makes the return "non est inventus," and the Court will then make an order, upon affidavit by the sheriff of *due diligence* (as to which see note (*h*), p. 476, *ante*), for a sequestration (see next note); or that the *serjeant-at-arms* arrest such person (except where the attachment is for want of appearance, see Ord. X. 10, p. 426, *ante*).

The ordinary returns made to the writ are three: (1) That the person cannot be found (see above). (2) That he is in prison (and a sheriff who improperly discharges a person in his custody is liable to be committed, *Kendal* v. *Baron*, 2 Dick. 661); or (3), that the sheriff has taken bail: but where the writ issues for non compliance with an order of the Court, the attachment is not bailable, and when a sheriff improperly returns that he has taken bail, a messenger will be ordered to go, *Cowdray* v. *Cross*, 24 Beav. 445.

Sequestration without writ of attachment.

(*e*) Where a party against whom a writ of sequestration is required is shown to be abroad, the Court may dispense with the writ of attachment altogether, *Re East of England Bank*, 2 Dr. & Sm. 284; and so where the writ of attach-

ment is by mistake issued into a wrong county in which the defendant does not reside, and a writ of *non est inventus* is returned, the Court will, on proof of his being abroad, order a sequestration to issue without another attachment (*Hodgson* v. *Hodgson*, 23 Beav. 604).

Mistake in writ of attachment.

As to sequestration on mesne process for want of answer, see Ord. XII. 6, and note, p. 434 (head 2), *ante;* and see Daniell, 453, 947, Seton, 1215, for the difference between a sequestration for non-performance of a decree and sequestration on mesne process, and the cases in which a sale will be directed on sequestration.

Sequestration on mesne process.

As to discharging the order for sequestration where it has been improperly obtained, see *Bignold* v. *Cobbold*, 11 Jur. N. S. 152.

Proceeding against *person and property.*

The seizure of the person under an attachment does not destroy the right to proceed against the property, *Roberts* v. *Ball*, 3 Sm. & G. 168; but it was held in *Const* v. *Barr*, 2 Sim. & St. 452, that the party detained in custody must be brought up to the bar of the court before a sequestration can issue. But see s. c. on appeal, 2 Russ. 161.

Where a sequestration proves ineffectual, the attachment may be revived by motion *on notice* (*Knott* v. *Cottee*, 19 Beav. 470, and see *ante*, p. 418).

Sequestration for costs.

As to sequestration after an attachment for costs, see *Davies* v. *Nixon*, 11 W. R. 62; Morgan & Davey, 365.

(*f*) See Daniell, 943.

Rule 4. Release of party committed or brought up by serjeant-at-arms.

4. Where a person is committed or brought up by the serjeant-at-arms for breach of a decree or order, he shall not be released until he has performed the decree or order in all things that are to be immediately performed, and given such security as the Court shall direct to perform the other parts of the decree or order (if any) at the future days and times thereby appointed (22nd May, 1661; Sanders, 308) (*g*).

Committal for contempt.

(*g*) The party brought up must pay the costs of the contempt (*Wright* v. *Taylor*, cited in Seton on Decrees, p. 631; and see further as to clearing a contempt, notes to Ord. XII. 3, p. 436, *ante*).

Clearing contempt.

Where a solicitor had been attached for not delivering his bill within the time specified in an order, and it subsequently appeared that money was due from him to his client, it was held that he could not be detained in custody until he should pay the monies so due, but for that purpose a separate motion on notice was necessary, *Re Powell*, 1 N. R. 461.

II. *Writ of Assistance.*

Rule 5. Right to writ.

5. Upon due service of a decree or order for delivery of possession, the person prosecuting the same shall be entitled to an order for a writ of assistance (26th Aug. 1841; Ord. 13) (*h*).

Evidence and form of writ.

(*h*) An affidavit in support of an application for this writ need not show an *existing* non-compliance with the order to be enforced (*Webster* v. *Taylor*, 18 Jur. 869). For the form of writ, see Seton, 1228.

Writ when granted.

A writ of assistance will be granted though the indorsement on the decree only states that the party disobeying it will be liable to attachment, serjeants-at-arms, or sequestration (*Bower* v. *Cooper*, 2 Hare, 412; but see *Hinde*

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v. *Blake*, 12 L. J. Ch. 56). A writ of assistance will not be granted to aid a receiver in distraining for rent, *White* v. *Phibbs*, Sausse & Scully, 88).

III. *Fieri Facias, Elegit, and Venditioni Exponas* (*i*).

Rule 6. Form of writ of fi. fa. or elegit.

6. Every person to whom, in any cause or matter pending in this court, any sum of money or any costs shall have been directed to be paid, shall, after the lapse of one month from the time when the decree or order for payment was duly passed and entered (*k*), be entitled to sue out one or more writ or writs of *fieri facias* or writ or writs of *elegit* of the form set forth in Schedules (F.) and (G.), or as near thereto as the circumstances of the case may require (10th May, 1839; Ord. 1) (*l*).

Issuing successive writs.

(*i*) These rules are framed pursuant to 1 & 2 Vict. c. 110, ss. 18 & 20, see p. 6, *ante*; and see *Spencer* v. *Allen*, 2 Ph. 215. Where a writ of *fi. fa.* issued into one county has failed to satisfy the demand, another writ may issue into another county (*ibid.*; and see *Hodgson* v. *Hodgson*, 23 Beav. 604).

Practice where only part of money is levied under fi. fa. under this rule.

The rules as to giving notice of liability to attachment (Ord. XXIII. 10), and as to sequestration where the attachment fails (Ord. XXIX. 3), do not apply to the process of *fi. fa.* (*Streeten* v. *Whitmore*, 5 Beav. 228), but a sequestration was directed after a return of *nulla bona* to a writ of *fi. fa.* (*Westby* v. *Westby*, 5 De G. & Sm. 516); and where part of the money directed to be paid had been levied under a *fi. fa.* issued under this rule, and the amount of the levy appeared on the return to the writ, the Court refused the four-day order for payment, but made the following order :—

"Let the chief clerk ascertain and certify the amount now due from the defendant to the plaintiff, and let the defendant, within ten days after the date of the chief clerk's certificate, pay to the plaintiff what shall be so certified to be due. The order to be taken on affidavit of service" (*Hipkins* v. *Hipkins*, 26 L. J. Ch. 512).

If order was irregular or not served, writ is irregular.

(*k*) When the order was to pay money on a day *before* the day on which the order was passed and entered, it was held by the Lords Justices that compliance with it was an impossibility, and that a writ of *fi. fa.* issued under it was irregular (*Adkins* v. *Bliss*, 2 De G. & J. 286); and if the order directs payment within a certain time from service and is never served, the writ cannot issue upon it, as in that case *there is no default* (*ibid.*). But where the time is not stated in the order the order is not made ineffectual, but the Court will on motion fix a time, see note (*h*), p. 490, *ante*. An order for payment of money to an account in the Bank of England is not within the rule (*Re Leeds Banking Company*, 1 L. R. Ch. 150).

(*l*) See Appendix, pp. ix., xii., *post*.

Rule 7. Order for payment to be marked with day on which it was left for entry.

7. Upon every such decree or order hereafter to be entered, one of the entering clerks shall, at the request of the party leaving the same, mark the day of the month and year on which the same is so left for entry; and no writ of *fieri facias* or *elegit* shall be sued out upon any such decree or order, unless the date of such entry is so marked thereon (10th May, 1839; Ord. 2).

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Rule 8. By whom and how writs executed. Return, delivery, &c., of writs.

8. Such writs when sealed shall be delivered to the sheriff or other officer to whom the execution of the like writs issuing out of the superior Courts of Common Law belongs, and shall be executed by such sheriff or other officer as nearly as may be in the same manner in which he ought to execute such like writs. And such writs, when returned by such sheriff or other officer (*m*), shall be delivered to the parties or solicitors by whom respectively they were sued out, and shall thereupon be filed as of record in the office of the Clerks of Records and Writs. And for the execution of such writs, such sheriff or other officer shall not take or be allowed any fees other than such as are or shall be from time to time allowed by lawful authority for the execution of the like writs issuing out of the superior Courts of Common Law (10th May, 1839; Ord. 3).

Fees.

(*m*) As to the execution and return of the writ, see note (*d*), p. 514, *ante*.

Rule 9. Form of writ of venditioni exponas.

9. Where it appears, upon the return of any such writ of *fieri facias* as aforesaid, that the sheriff or other officer has by virtue of such writ seized but not sold any goods of the person directed to pay such sum of money or costs as aforesaid, the person to whom such sum of money or costs is payable shall, immediately after such writ with such return shall have been filed as of record, be at liberty to sue out a writ of *venditioni exponas* in the form set forth in Schedule (H.), or as near thereto as the circumstances of the case may require (10th May, 1839; Ord. 4) (*n*).

(*n*) See Appendix, p. xviii., *post*.

Rule 10. Indorsement on writs of fi. fa. and elegit.

10. On every such writ of *fieri facias* and *elegit* so to be issued as aforesaid, there shall be indorsed, in addition to the particulars required by the 2nd or 5th Rule of Order III., the words, "By the Court," and also thereunder the calling and place of residence of the person against whom such writ shall be issued; and every such writ shall be also indorsed for the sum to be levied, according to the form used upon like writs issuing out

ORDER XXIX. Process to enforce Decrees and Orders.

of the superior Courts of Common Law (10th May, 1839; Ord. 5).

IV. *Fieri Facias de bonis Ecclesiasticis and Sequestrari Facias de bonis Ecclesiasticis.*

Rule 11. Writs of fi. fa. de bonis ecclesiasticis or sequestrari facias.

11. Where it appears, upon the return of any writ of *fieri facias* or any writ of *elegit* issued in pursuance of the 6th Rule of this Order, that the person against whom such writ was so issued, is a beneficed clerk, and has no goods or chattels nor any lay fee in the bailiwick of the sheriff to whom such writ was directed, the person to whom the sum of money or costs mentioned in such writ is or are payable, shall, immediately after such writ with such return shall have been filed as of record, be at liberty to sue out one or more writ or writs of *fieri facias de bonis ecclesiasticis*, or one or more writ or writs of *sequestrari facias*, in the form stated in schedule (J.), or as near thereto as the circumstances of the case may allow (18th July, 1857; Ord. 2) (*o*).

(*o*) See Appendix, p. xix., *post*. See before this rule, *Allen* v. *Williams*, 3 W. R. 85; *Hawkins* v. *Gathercole*, 1 Drew. 12.

Rule 12. Indorsement.

12. On every such writ of *fieri facias de bonis ecclesiasticis* or writ of *sequestrari facias* so to be issued as aforesaid, there shall be indorsed, in addition to the particulars required by the 2nd or 5th Rule of Order III., the words "By the Court," and also thereunder the calling, if any, and place of residence, if any, of the person against whom such writ shall be issued; and every such writ shall be also indorsed for the sum to be taken or levied, according to the form used upon like writs issuing out of the superior Courts of Common Law (18th July, 1857; Ord. 3).

Rule 13. Proceedings thereon.

13. Such writs, when sealed, shall be delivered to the bishop, and shall be executed by him as nearly as may be in the same manner in which he ought to execute such like writs issuing out of the superior Courts of Common Law. And such writs, when returned by the bishop, shall be delivered to the parties or solicitors by whom respectively they were sued out, and shall thereupon be

filed as of record in the office of the Clerks of Records and Writs. And for the execution of such writs, the bishop or his officers shall not take or be allowed any fees other than such as are or shall be from time to time allowed by lawful authority for the execution of the like writs issuing out of the superior Courts of Common Law (18th July, 1857; Ord. 4).

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Fees.

ORDER XXX.

ORDER XXX. Process generally.

PROCESS GENERALLY (*a*).

Rule 1. Executing of process of contempt.

1. Every suitor who prosecutes a contempt (*a*) shall use his best endeavour to procure each process to be duly served and executed upon the party prosecuted; otherwise he shall pay costs unto the party aggrieved, and lose the benefit of the process returned (22nd May, 1661; Sanders, 306).

(*a*) See notes on process to enforce decrees and orders, p. 513, *ante*, and on process to enforce an answer, p. 433, *ante*.

As to matters of contempt generally, see Seton, 1238, and cases cited in note (*a*), p. 609, *post*.

Rule 2. Order for serjeant-at-arms to be drawn up and delivered to the serjeant.

2. After any order for a serjeant-at-arms shall be granted by the Court, the registrar shall on request draw up the said order, and deliver the same to the serjeant-at-arms or his deputy, who shall thereupon endeavour to apprehend the party prosecuted and bring him into court to answer his contempt, if he can. But if he cannot, no such order for a serjeant-at-arms shall be discharged, nor the contempt thereupon, without a certificate under the hand of the serjeant-at-arms that his fees have been paid. And after the said order shall have been so drawn up and passed, no private or other agreement shall be made between the party prosecuting the contempt and the person standing in contempt, or on their behalf, for a compromise of the suit or the discharge of the contempt, unless such satisfaction shall be made, and a certificate thereof shall be produced to the Court (4th Nov. 1674; 13th July, 1685; 12th June, 1694).

Payment of fees to be made before order, &c., discharged.

ORDER XXX. Process generally.

Rule 3. New writ of habeas.

3. Where a party is brought up to this Court by virtue of any writ of *habeas* duly issued from the office of the Clerks of Records and Writs, and by reason of the pressure of other business, or from any other cause, the hearing of the cause or matter in which such party is concerned is postponed to a future day, a new writ of *habeas* may be issued for such future day, if the Court shall so direct, without payment of any fee (31st Jan. 1846).

Rule 4. Writ of execution to enforce decrees, &c., abolished.

4. No writ of execution shall be issued for the purpose of requiring or compelling obedience to any decree or order, but the person required by any such decree or order to do any act, shall, upon being duly served with such decree or order, be held bound to do such act in obedience thereto (11th April, 1842; Ord. 6, amending 10th Ord. of 26th Aug. 1841).

Rule 5. Writs of attachment with proclamations and writs of rebellion abolished.

5. No writ of attachment with proclamation nor any writ of rebellion shall be issued for the purpose of compelling obedience to any process, order, or decree of the Court (26th Aug. 1841; Ord. 6).

ORDER XXXI. Proceedings to reverse, alter, or explain Decrees and Orders.

ORDER XXXI.

PROCEEDINGS TO REVERSE, ALTER, OR EXPLAIN DECREES AND ORDERS (*a*).

1. *Rehearings and Appeals* (*b*).

Rule 1. Time for appeal and rehearings.

1. No appeal from any decree or order or any rehearing of the case on which such decree or order is founded, shall be allowed, unless the same is set down for hearing, and the requisite notice thereof duly served, within five years from the date of such decree or order respectively (7th Aug. 1852; 2nd Set, Ord. 1). But the Lord Chancellor or the Lords Justices shall be at liberty, where it shall appear to him or them under the peculiar circumstances of the case to be just and expedient, to enlarge that period (*c*) (7th Aug. 1852; 2nd Set, Ord. 6).

How enlarged.

Appeal from motions, petitions, chambers, &c.

(*a*) Appeals from motions are by motion, except *motions for decree*, as to which see rule 8, *infra*, p. 524. Appeals from petitions are by petition, or in some cases by motion. See p. 529, head (8), and 530, head (5), *post*.

As to appeals from orders of course, see p. 131, *ante*.

As to appeals from chambers, see p. 150, *ante*, and from the Palatine Court, see p. 136, *ante*.

ORDER XXXI. Proceedings to reverse, alter, or explain Decrees and Orders.

(*b*) *Clerical* errors may be corrected on summary application before, and in some cases even after inrolment, note (*v*), p. 493, *ante*.

As to *new directions* varying, not the decree, but the prosecution of it in chambers, see Ord. XXXV. 19, p. 550, *post*.

Clerical errors.

Decrees may be altered,

New directions.

(A) In respect of *new facts* which have occurred since the decree, and such new facts may be introduced,

NEW FACTS.

(1) Before inrolment: by *supplemental bill* (see note (*q*), p. 218, *ante*) which, if necessary, may come on with a *rehearing* of the original decree (*infra*), *Head* v. *Godlee*, John. 536, 579, and compare *Horne* v. *Barton*, 8 D. M. G. 587. But if such new facts are inconsistent with the frame of the decree, the *supplemental* bill becomes *in the nature of a bill of review*, and cannot be filed without the leave of the Court, see note (*m*), p. 525, *post*.

(1) *Before inrolment.*

(2) After inrolment: by *bill of review* (see rule 10, *infra*).

(2) *After inrolment.*

(B) If the objection to the decree is founded on matter of *law*, or the law has been altered (*Fleming* v. *Fleming*, 9 W. R. 757), it may be varied,

APPEAL FROM ERROR IN LAW.

(1) Before inrolment: on a *rehearing* (see *Nutter* v. *Harrison*, 2 W. N. 225), and such rehearing, when it takes place before the Court of Appeal in Chancery (p. 139), is sometimes called an appeal. A cause which has been reheard before the same judge may be again reheard before the Court of Appeal without leave, *Maybery* v. *Brooking*, 7 D. M. G. 673; *secus* when it has been reheard by the Court of Appeal, *Ex parte Besley*, 3 M. & G. 287.

(1) *Before inrolment* by rehearing.

(2) After inrolment: if the error in law appears upon the face of the decree, *by bill of review* (p. 525, *post*): but if the error in law does not so appear, appeals from inrolled decrees are carried to the House of Lords, see p. 138, *ante*, and note (*g*), p. 498, *ante*.

(2) *After inrolment* by bill of review or appeal to Lords.

Rehearings are not generally allowed in the following cases:—

No rehearing,

(1) For *costs alone*; except

(1) For costs *alone*.

(*α*) In extreme cases, but see *Chappell* v. *Gregory*, 2 D. J. S. 111; *Collard* v. *Rowe*, 7 W. R. 623; *Perks* v. *Wycombe Railway Company*, 1 N. R. 1; *Perks* v. *Stodhert*, 11 W. R. 1013; Seton, 1157; Ayckbourn, 379.

(*β*) Where the costs are charged on a particular fund or estate.

(*γ*) Where a question of principle or practice is involved; and see Morgan & Davey, 105, 106, and *Re Tiel*, 11 W. R. 351.

(2) Where the order is drawn up as made by consent, *Carew* v. *Cooper*, 12 W. R. 767, *Cookes* v. *Cookes*, 12 Jur. 294; but see as to cases of fraud, *Brooke* v. *Lord Mostyn*, 13 W. R. 115; *Anon.*, 1 Ves. Jun. 93.

(2) Where decree was by consent.

The following persons are allowed to appeal as well as the adverse party on the record:

Appeals by,

(1) One co-plaintiff against another, *Jopp* v. *Wood*, 2 D. J. S. 323.

1. Co-plaintiff.

(2) Persons not parties to the cause, if materially interested in the order to be appealed from, *Parmiter* v. *Parmiter*, 2 D. F. J. 526; *Jopp* v. *Wood* (2), 33 Beav. 372; *Leate* v. *Jenkins*, 14 W. R. 489.

2. Persons not parties but interested.

(3) Parties served with the decree, and having leave to attend the proceedings, *Ellison* v. *Thomas*, 1 D. J. S. 13; *Kidd* v. *Cheyne*, 18 Jur. 348.

3. Or having leave to attend.

Evidence referred to, not in the order under appeal but in a previous order in the cause, cannot be read on the appeal, *Jenner* v. *Morris*, 1 L. R. Ch. 603.

Evidence on appeal.

The judge's notes of *vivâ voce* evidence are *primâ facie* evidence on appeals, Ord. 5 Feb. 1861, r. 14, p. 625, *post*.

As to new *documentary* evidence being admitted on a rehearing, see *Glover* v. *Daubeny*, 9 Jur. N. S. 90; Daniell, 1368; and as to the costs in such a case, see Morgan & Davey, 104.

(*c*) See *ante*, notes to Ord. XXIII. 28, pp. 497, 8. The order to enlarge the period will not be made *ex parte*, *Buckeridge* v. *Whalley*, 2 N. R. 404.

Enlarging time for rehearing.

2. Where any rehearing is granted, such rehearing shall not in any way stop or hinder any proceedings on the

Rule 2. Rehearing not to stop proceed-

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decree or order appealed from, unless by special order of the Court (*d*); but the person in possession of any decree or order shall be at liberty to proceed thereon as if no appeal or rehearing had been granted (12th May, 1686).

ings on decree, &c., appealed from.

(*d*) The application to stay proceedings pending the appeal is by motion after notice, and should be immediate (*Herring* v. *Clobery*, 12 Sim. 410); it need not necessarily be made to the judge who pronounced the decree, notwithstanding Ord. VI. 1, *ante*, *Earl of Shrewsbury* v. *Trappes*, 2 D. F. J. 172; but see *Price* v. *Salisbury*, 11 W. R. 1014.

Application to stay proceedings pending an appeal.

When granted.

The application has been granted where irreparable mischief would otherwise be likely to ensue, *e. g.*, where the plaintiff declined to give security for repayment of rents, or of costs in the event of a reversal of the decree, *Barrs* v. *Fewkes*, 1 L. R. Eq. 392 (where it was said that of late years, appeals being conducted with greater rapidity than formerly, these applications have been more frequently granted), and see *Gibbs* v. *Daniel*, 4 Giff. 41, note; *Ralli* v. *Universal Marine Assurance Company*, 10 W. R. 327. A plaintiff having obtained an order for production of documents, was restrained from inspecting them, pending an appeal from the order, *Kelly* v. *Hutton*, 15 W. R. 916. A shareholder pronounced a contributory was allowed to pay calls into court, pending an appeal, *Jopp's case*, 2 W. N. (1867), 192; see Seton, 1157; *Colyer* v. *Finch*, 20 Beav. 555; *Bourne* v. *Buckton*, 35 L. J. Ch. 851 (V. C. K.); *Lord* v. *Colvin*, 1 Dr. & Sm. 475; *Wood* v. *Farthing*, 8 W. R. 425; *Portarlington* v. *Damer*, 11 W. R. 869; *Price* v. *Salisbury*, *ibid.*, 1014; *Garcias* v. *Ricardo*, 1 Ph. 498.

When defendant need not answer pending appeal as to demurrer.

So where a demurrer or plea to discovery has been overruled, and the defendant appeals, the Court will stay proceedings to enforce an answer if there has been no delay, or if the defendant would be prejudiced by answering, *Drake* v. *Drake*, 3 Hare, 528; *Garcias* v. *Ricardo*, 1 Ph. 498; *Saunders* v. *Richardson*, 2 W. R. 358.

When refused.

But the application has been refused where the appeal has been considered hopeless (see *Lord* v. *Colvin*, l. c.), or if the effect of staying proceedings would be a reversal of the order; thus where an injunction had been granted and a motion for a new trial of issues was being carried by appeal to the House of Lords, the Court refused to dissolve the injunction pending the appeal, *Penn* v. *Bibbey*, 3 L. R. Eq. 308. So where an injunction was refused the defendant could not be restrained, pending an appeal, *Galloway* v. *Mayor of London*, 3 D. J. S. 59. And where the defendant had been ordered to execute a conveyance, and applied to suspend such execution, pending an appeal, the application was refused, on the plaintiff consenting that notice of the appeal should be endorsed on the conveyance, *Wilson* v. *West Hartlepool Railway Company*, 34 Beav. 414. And costs have been ordered to be paid, notwithstanding an appeal, *Colyer* v. *Colyer*, 10 W. R. 748; *Archer* v. *Hudson*, 8 Beav. 321; and terms have been imposed on the party appealing and desiring to stay proceedings, *Taylor* v. *Midland Railway Company*, 9 W. R. 854; *McIntosh* v. *Great Western Railway Company*, 13 W. R. 1029; *Monypenny* v. *Monypenny*, 8 W. R. 430.

In case of *injunction*.

Terms imposed on party appealing.

When decree impeached for fraud.

An order staying proceedings where there was no appeal pending, but only a bill impeaching a decree for frauds, was dismissed as irregular, *Whitehead* v. *Lynes*, 12 L. T. N. S. 332.

Costs of application.

The costs of the motion must in general be paid by the party applying whether successful (*Bauer* v. *Mitford*, 9 W. R. 135; *Topham* v. *Earl of Portland*, 11 W. R. 813; *Barres* v. *Fewkes*, l. c.,) or unsuccessful (*Waldo* v. *Caley*, 16 Ves. 214; *Wilson* v. *West Hartlepool, &c. Railway Company*, 34 Beav. 414); but this rule is not inflexible, *Earl of Shrewsbury* v. *Trappes*, 2 D. F. J. 172; *Morison* v. *Morison*, 3 W. R. 296.

No jurisdiction when bill is dismissed.

When the bill is *dismissed* by the Court of Appeal, the application cannot be granted pending appeal to the House of Lords, for the jurisdiction is gone, see *Galloway* v. *Mayor of London*, l. c.; *Oddie* v. *Woodford*, 3 M. & C. 625.

ORDER XXXI. Proceedings to reverse, alter, or explain Decrees and Orders.

3. In any petition of rehearing of any decree or order, it shall be necessary to state the proceedings anterior to the decree or order appealed from or sought to be reheard (26th Aug. 1841; Ord. 50) (*e*).

Rule 3. Petition of rehearing.

(*e*) A petition of appeal must usually be signed by two counsel, *Parkinson* v. *Hanbury*, 13 W. R. 191; but where the property at stake is very small, the signature of one may be held sufficient, *Buckeridge* v. *Whalley*, 10 W. R. 513; *Knowles* v. *Greenhill*, 30 L. J. Ch. 670; especially where that counsel alone was concerned in the court below, *De Beauvoir* v. *Benyon*, 14 W. R. 41; *Re Skeggs' Settlement*, 13 W. R. 512; or where the plaintiff sued *in formâ pauperis*, *Jones* v. *Gregory*, 12 W. R. 92.

Signature of counsel to petition of appeal.

But one counsel at least must sign the petition of appeal, even though the party desiring to appeal argued his own case in the court below, *Buckeridge* v. *Whalley* (l. c.).

When one counsel is sufficient.

But where the person presenting a petition for rehearing of a petition was no party to the cause, and had not been served with the original petition, it was held that counsel's signature was not necessary, *Leate* v. *Jenkins*, 14 W. R. 489.

Rule 4. Deposits on appeal or rehearing.

4. When any person appeals from a decree or order made on the original hearing of a cause or on further consideration, or obtains a rehearing of a cause, the person so appealing or obtaining such rehearing shall deposit in the hands of the registrar the sum of twenty pounds (*e*), to be paid to the opposite party when the decree or order is not varied in any material point, together with the further taxed costs occasioned by the appeal or rehearing, unless the Court shall otherwise direct (7th Feb. 1794. 3rd April, 1828; Ord. 42) (*f*).

(*f*) Where an appeal is dismissed without costs, the deposit will be returned to the appellant (*Dell* v. *Barlow*, 2 R. & M. 686, where it was said the deposit was only a security for costs; and see, too, *Rattenbury* v. *Fenton*, C. P. C. temp. Brougham, 435).

Return of deposit.

A pauper may be allowed to appeal without this deposit; but only on obtaining a special certificate from counsel that there are strong grounds for appeal (*Grimwood* v. *Shave*, 5 W. R. 482); see p. 404, *ante*.

Pauper.

In addition to this deposit there must be an undertaking to pay such further costs incurred subsequently to the decree as the Court may direct (Seton, 1156). This undertaking, however, applies only to costs incurred in prosecuting the decree (*Price* v. *Dewhurst*, 4 M. & Cr. 282).

Undertaking to pay *further costs*.

In *Richards* v. *Platel*, Cr. & Ph. 84, the Lord Chancellor held that an appeal *petition* to discharge an interlocutory order at the Rolls was not a petition of appeal, but a fresh petition, and therefore not within this rule.

Appeal *petition* not within rule.

Rule 5. Appeal deposit account.

5. The senior registrar for the time being shall set down the deposits received by him under the Statute 15 & 16 Vict. c. 87, s. 41, in a book to be kept by him for that purpose, together with a memorandum of the name of the cause on which each deposit is made, and of the

ORDER XXXI. Proceedings to reverse, alter, or explain, Decrees and Orders.

person making the same, and of his solicitor. And where the Court has heretofore by any order directed or shall hereafter direct any such deposit or portion of deposit to be paid, the same shall be paid by the Accountant-General out of any cash which at the time of such payment may be in the Bank to the credit of the account intituled "The Appeal Deposit Account," to the person to whom such deposit or portion of deposit is ordered to be paid, or to his solicitor to be named in such order, whose receipt in such latter case shall be a sufficient discharge for the same (10th Dec. 1852).

Rule 6. Copy of bill and petition of rehearing to be left with Judges of Appeal.

6. Where a petition of rehearing of a cause is presented, a true copy thereof, and a printed copy of the bill, shall, at the time of presenting such petition, be left for the Lord Chancellor or the Lords Justices (see Ord. of 23rd Oct. 1689).

Rule 7. Party served with order for appeal, making default on rehearing.

7. Where a party who has been duly served with a copy of an order for setting down a cause to be reheard on a petition of appeal or for a rehearing, does not appear on the rehearing, there, on proof by affidavit of such service, such order shall be made upon the rehearing as under the circumstances of the case shall appear to be just (*g*) (3rd Aug. 1831).

(*g*) See note to Ord. XXII. 8, p. 480, *ante*.

Rule 8. Appeal from decree or decretal order made on motion.

8. Where any decree or decretal order has been made upon motion, no rehearing or appeal shall be allowed, either before the same judge, or before the Lord Chancellor or the Lords Justices, upon motion; but in every such case there shall be a petition of rehearing or appeal in the same manner and form, and with the same certificate of counsel, and with the same subscription by the petitioner or his solicitor with respect to costs, and with the same deposit, as are required for a rehearing when a decree has been made upon the hearing of a cause regularly set down for hearing (12th July, 1858).

Subscription and deposit.

II. *Bills of Review and other Bills of that Nature.*

Rule 9.

9. No decree which has been signed and inrolled (*h*)

shall be reversed, altered, or explained, but upon bill of review (*i*) (29th Jan. 1618-19; Ord. 1, 13).

ORDER XXXI. Proceedings to reverse, alter, or explain Decrees and Orders.

(*h*) As to entering a caveat against enrolment, see note (*c*), p. 497, *ante*; and as to altering clerical errors after enrolment, see p. 493, *ante*.

(*i*) As to who may appeal, and the mode of appealing generally, see note (*b*), p. 521, *ante*.

Decree signed and enrolled only varied on bill of review.

An order directing the transfer of a fund into court to a separate account, is not equivalent to a decree declaring an absolute right to the fund, and may be corrected without bill of review, *Noble* v. *Stow*, 7 W. R. 709; and see Order XXXV. 19, and note, p. 550, *post*, as to alteration of orders made only in prosecution of a decree.

Caveat.

What may be altered without bill of review.

An order made under the Trustee Relief Act may be varied by a bill of review, see note (*a*), p. 65, *ante*.

10. No bill of review or supplemental or new bill in the nature of a bill of review (*j*), shall be admitted, except upon error in law appearing on the face of the decree (*k*) without further examination of matters in fact, or upon some new matter (*l*) which has been discovered after the decree and could not possibly have been used when the decree was made (29th Jan. 1618-19; Ord. 1. 17th Oct. 1741).

Rule 10. Grounds of bill of review, &c.

(*j*) As to a supplemental bill after decree, see note (*b*), p. 521, *ante*; and for cases in which it is held to be in the nature of a bill of review, so as to require the leave of the Court, see note (*m*), *infra*.

Supplemental bill in nature of bill of review.

(*k*) The decree must be contrary to the forms of the court (as in the case of an absolute decree against an infant); not merely erroneous in judgment (*Trulock* v. *Robey*, 15 Sim. 265; on appeal, 2 Ph. 395, following *Perry* v. *Phelips*, 17 Ves. 173; *Tommey* v. *White*, 1 H. L. Ca. 160; see *Gould* v. *Tancred*, 2 Atk. 534, as to the mode in which the question may be raised; and *Henderson* v. *Cook*, 4 Drew. 306; *Green* v. *Jenkins*, 1 D. F. J. 454).

"Error in law."

(*l*) The new evidence adduced must be such as would have been likely, if added to the evidence before brought forward, to have turned the scale, *Hungate* v. *Gascoigne*, 2 Ph. 25; *Wason* v. *Westminster Improvement Commissioners*, 4 L. T. N. S. 80; *Thomas* v. *Rawlings*, 34 Beav. 50, and see *Re Warwick, &c. Railway Company*, 9 W. R. 329; *Creswell* v. *Jackson*, 11 L. T. N. S. 530; *Young* v. *Keighly*, 16 Ves. 350; *Hosking* v. *Terry*, 10 W. R. 884.

New facts.

11. No bill of review, or supplemental or new bill in the nature of a bill of review, grounded upon new matter discovered after the decree, shall be admitted without the special leave of the Court first obtained for that purpose (*m*) (17th Oct. 1741. 29th Jan. 1618-19; Ord. 1).

Rule 11. Leave of Court to be obtained for filing.

(*m*) It must be shown that such leave was regularly obtained (*Tommey* v. *White*, 1 H. L. Ca. 160. But see *Lubier* v. *Cross*, Dick. 123).

When a supplemental bill is in nature of bill of review.

A supplemental bill introducing new or supplemental matter *inconsistent with the decree*, is held to be in the nature of a bill of review, and, therefore, to require the leave of the Court. Thus, when a common administration decree has been obtained, a supplemental bill charging the executors with wilful

ORDER XXXI. Proceedings to reverse, alter, or explain Decrees and Orders.

default is inconsistent with the decree, and cannot be filed without leave, *Morrell* v. *Pritchard*, 14 W. R. 172 ; *Davies* v. *Bluck*, 6 Beav. 393 ; *Harvey* v. *Bradley*, 4 L. R. Eq. 13 ; and see *Tynte* v. *Hodge*, 2 H. & M. 287 ; *Partington* v. *Reynolds*, 4 Drew. 253 ; *Taylor* v. *Taylor*, 12 Beav. 220 ; and as to the costs of a petition for leave to file such bill, see s. c. 6 W. R. 307.

Rule 12. Deposit on bill of review.

12. No bill of review shall be admitted, unless the party exhibiting the same first deposit the sum of 50*l.* with the registrar, as a pledge to answer such costs and damages as the Court shall award to the opposite party, in case the Court shall think fit to dismiss such bill of review (12th March, 1700-1).

Rule 13. Deposit on a bill in nature of a bill of review.

13. No supplemental or new bill in the nature of a bill of review grounded upon new matter discovered after the decree shall be admitted, unless the party exhibiting the same first deposit with the registrar so much money as together with the deposit by the rules of this Court to be made on obtaining a rehearing of the cause or causes wherein such decree was pronounced, will make up the sum of 50*l.*, as a pledge to answer such costs and damages as shall be awarded to the opposite party, in case the Court shall think fit to award any at the hearing of the cause on such supplemental or new bill (17th Oct. 1741).

Rule 14. Performance of decree necessary before bill of review, &c., admitted.

14. No bill of review shall be admitted, nor any other new bill to reverse or alter a decree, unless the decree be first obeyed and performed; except that if any act is decreed to be done which extinguishes a right at the common law, as the making of assurance or release, acknowledging satisfaction, cancelling of bonds or evidences, and the like, the Court may dispense with the actual performance of that part of the decree until such bill be determined (29th Jan. 1618-19; Ord. 3 & 4).

ORDER XXXII. Revivor and Supplement.

ORDER XXXII.

REVIVOR AND SUPPLEMENT (*a*).

Rule 1. Time of application to dis-

1. Any person under no disability or under the disability of coverture, who may be served with an order

under the Stat. 15 & 16 Vict. c. 86, s. 52 (*b*), to revive any suit or to carry on the proceedings therein, may apply to the Court to discharge such order within twelve days after such service; and any person being under any disability, other than coverture, who may be so served, may apply to the Court to discharge such order within twelve days after the appointment of a guardian or guardians *ad litem* for such person: and until such period of twelve days shall have expired, such order shall have no force or effect as against such last-mentioned person (7th Aug. 1852; 1st Set, Ord. 43).

Discharge order of revival.

(*a*) For the cases on revivor and supplement, see pp. 211—6, *ante*.
(*b*) See note (*l*), p. 215, *ante*, as to service of orders of revivor.

Revivor and supplement.

2. Where the plaintiff in any cause which is not in such a state as to allow of an amendment being made in the bill, desires to state or put in issue any facts or circumstances which may have occurred after the institution of the suit, he may state the same, and put the same in issue by filing in the Record and Writ Clerks' Office a statement, either written or printed, to be annexed to the bill; and such proceedings by way of answer, evidence, and otherwise, shall be had and taken upon the statement so filed, as if the same were embodied in a supplemental bill; provided always, that the Court may make any order which it shall think fit for accelerating the proceedings thereunder, or proceedings therein, in any manner which may appear just and practicable (7th Aug. 1852; 1st Set, Ord. 44) (*c*).

Rule 2. Supplemental statement.

(*c*) See 15 & 16 Vict. c. 86, s. 53, *ante*, p. 216, and note.

3. It shall not be necessary in any bill to revive a suit, or in any supplemental bill to set forth any of the statements in the pleadings in the original suit, unless the special circumstances of the case may require it (26th Aug. 1841; Ord. 49) (*d*).

Rule 3. Form of bills of revivor and supplemental bills.

(*d*) Notwithstanding this rule, the bill of revivor, &c., must show a title in the plaintiff to revive the suit (*Griffith* v. *Ricketts*, 3 Hare, 476; and see *Anderson* v. *Wallis*, 6 Jur. 906; and *Phelps* v. *Sproule*, 4 Sim. 319, before the rule).

Bill of revivor must show title.

ORDER XXXII. Revivor and Supplement.

A supplemental bill with the original bill attached to it as a schedule was allowed to be filed, *Grey Coat Hospital* v. *Westminster Improvement Commissioners*, 2 De G. & J. 61.

Rule 4. Revivor on death of sole plaintiff.

4. Where a suit abates by the death of a sole plaintiff (*e*), the Court, upon motion of any *defendant* (*f*) made on notice served on the legal representative (*g*) of the deceased plaintiff, may order that such legal representative do revive the suit within a limited time, or that the bill be dismissed (*h*) (8th May, 1845; Ord. 63).

Death of *sole* plaintiff.

(*e*) See note (*g*), p. 211, *ante*. Before this rule no such order could be made in the case of a *sole* plaintiff, *Lee* v. *Lee*, 1 Hare, 617 (where *Chowick* v. *Dimes*, 3 Beav. 290, was not followed), but only where there were several plaintiffs, and one died.

What *defendant* may move for revivor.

(*f*) The *executors* of a deceased defendant are within the rule (*Norton* v. *White*, 2 D. M. G. 678, overruling *Reeves* v. *Baker*, 13 Beav. 115); *Cross* v. *Cross*, 11 W. R. 797, Pemberton, p. 92; and the rule applies to a defendant who has put in a voluntary answer, *Pudge* v. *Pitt*, 3 W. R. 100.

No order for plaintiff to revive *after decree*.

The motion cannot be made after decree, *Mills* v. *Dudgeon*, 1 W. R. 514 (where V.-C. Kindersley declined to follow *Price* v. *Berrington*, 11 Beav. 90), for after decree the defendant may himself revive the suit if he pleases, see note (*g*), p. 211, *ante*; and so the rule does not enable a defendant to move that the executors of a plaintiff, who has died after obtaining an injunction to restrain an action, may revive the suit, or in default that the injunction be dissolved (*Oldfield* v. *Cobbett*, 20 Beav. 563).

Where injunction had been obtained.

"Legal representatives."

(*g*) Where freeholds are the subject of the suit, these words include the heir (*Price* v. *Berrington*, 11 Beav. 90).

When there is no legal representative of one of several co-plaintiffs who dies, the bill will be dismissed notwithstanding, as it is the duty of the surviving plaintiffs to appoint such a representative (*Saner* v. *Deavin*, 16 Beav. 30).

Death of relators.

Where the relators to an information are all dead, the Court will restrain proceedings until a new relator is appointed (*Attorney-General* v. *Haberdashers' Company*, 16 Jur. 717).

Dismissal of bill. Costs.

(*h*) Where an order for revivor, or dismissal in default thereof, is made, the plaintiff has not to pay the costs of the motion, *Cross* v. *Cross*, 11 W. R. 797; *Hill* v. *Gaunt*, 9 W. R. 68; *Pudge* v. *Pitt*, 3 W. R. 100; but they are costs in the cause, *Hinde* v. *Morton*, 2 H. & M. 370.

ORDER XXXIII. Motions.

ORDER XXXIII.

MOTIONS (*a*).

I. *Notices of Motion* (*b*).

Rule 1. Notices of motion must name the judge.

1. Every notice of motion intended to be made before any judge shall express that the same is intended to be made before that judge (*c*) (13th Dec. 1814).

(*a*) As to appeal motions, see note (*a*), p. 521, *ante*, and this note, head (5), p. 530, and p. 531, *ad finem;* and as to setting them down, see 11 Registr. Regul., March, I860, Appendix p. lxxxii., *post.*

ORDER XXXIII. Motions.

Motions are either "of course" or special. Motions of course are granted without the Court being called upon to investigate the truth of any allegation or suggestion upon which they are founded, and are not mentioned in court; but it is the practice for the counsel to sign the brief, and to hand it to the registrar in court, who enters it in his book, marks the brief with his initials, and then returns it to the counsel (Daniell, 1441).

Appeal motions.

MOTIONS OF COURSE.

After an order of course has been obtained, it ought to be served as soon as possible upon the party intended to be affected by it, or his solicitor; for if the other party takes a step before the order is served, that step being in itself regular, the order cannot afterwards be acted upon, if it will interfere with the step so taken (see *Church* v. *Marsh*, 2 Hare, 652, Daniell, 1439).

Order to be *served.*

A motion of course cannot be opposed (*Eyles* v. *Ward*, Moseley, 255); the proper proceeding being to give notice of motion to discharge it. See for examples of irregular motions of course, in cases where special application was necessary, note (*k*), p. 215, and (*f*), p. 386, *ante.*

Irregular order *of course*, not a nullity, but may be discharged.

Applications by motion are either *in a cause* or *in a matter.*

MOTIONS.

(A) Applications in a cause should be by motion only in cases where the order sought arises out of recent proceedings upon which there is no doubt, *Lord Shipbrooke* v. *Lord Hinchinbrook*, 13 Ves. 393, Daniell, 1436-7. Otherwise they should be by petition (see p. 540, *post*): for the Court will not on an interlocutory motion, even when the other side has been served and appears, make an order which will decide the merits of the case, *Like* v. *Beresford*, 3 B. C. C. 365; *Tullett* v. *Armstrong*, 1 Keen, 428; and see note (*u*), p. 220, *ante;* but cf. *Revel* v. *Hussey*, 2 Ball. & B. 286.

(A.) IN A CAUSE.

Court will not decide merits on motion.

Thus it is proper to apply by motion in a cause for—

(1) A writ of *ne exeat*, which will only be granted on clear evidence of an *equitable* claim, *Thompson* v. *Smith*, 13 W. R. 422; see as to this writ, 15 & 16 Vict. c. 86, s. 6, p. 163, *ante;* and see also, *Anderson* v. *Stamp*, 2 H. & M. 576; Daniell, 1543; Williams on Executors, 1867.

Writ of *ne exeat.*

(2) For payment *into* court *pendente lite;* to justify which order it must appear clearly from the answer that the money is due from the defendants, see *Pryse* v. *Cambrian Railway Company*, 2 L. R. Ch. 444; *Hagell* v. *Currie*, *ibid.* 449, reversing s. c. 15 W. R. 502; *Whitmore* v. *Turquand*, 1 J. & H. 296.

For payment *into* Court.

Payment out of court must generally be applied for by petition, p. 540, *post;* but when money had been carried over to a legacy account, and the title was clear, the Court on motion ordered a transfer to the party entitled (*Linford* v. *Cooke*, 6 W. R. 5, V.-C. K.; *Heathcote* v. *Edwards*, Jac. 504), and so when the rights of the parties had been determined by award, though there had been no decree (*Oliver* v. *Burt*, 1 Beav. 583).

Not generally for payment *out.*

(3) For a receiver, p. 499, *ante*, or injunction, p. 503, *ante.*

(4) To dismiss a bill, whether the application is by the plaintiff (see p. 491, *ante*), or by the defendant (see p. 535, *post*); but in *Thompson* v. *Knight*, 9 W. R. 780, the application was by petition.

To dismiss a bill.

(5) To take improper or unauthorised pleadings off the file, *Jardine* v. *Bright*, cited *ante*, p. 408; *Read* v. *Barton*, cited *ante*, p. 452.

To take irregular proceedings off the file.

(6) To correct clerical mistakes in decrees, *ante*, p. 493.

(7) To inrol decrees, *ante*, p. 497.

(8) To discharge orders made on former motions, or even petitions, when the irregularity is apparent, *West* v. *Smith*, 3 Beav. 306.

Appeal motions.

A party moving to discharge an order on the ground of its irregularity is not bound to state what the irregularity is in the notice of motion (*Brown* v. *Robertson*, 2 Ph. 173). But the omission may be material on the question of costs (*ibid.*, and see *Lambert* v. *Hill*, 1 Dru. & War. 14).

(9) To carry decrees or orders (but not *compromises*, see head (3), p. 540, *post*) into effect, but only in *clear cases*, *Lord Shipbrooke* v. *Lord Hinchinbrook*, 13 Ves. 393; see note (*h*), p. 490, *ante*, and (*v*), p. 537, *post*, as to motions to fix time for plaintiff's amendment, when the original order did not fix any time. See, also, *Poligno* v. *Martin*, 16 Beav. 586 (where the

In pursuance of decrees.

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application was to rescind the contract, the defendant having made default after decree for specific performance; *Pitt* v. *Bonner*, 1 Y. & C. C. C. 670 (where the application was for contribution under a decree).

Orders to inspect mines, &c., in a suit, may be made either on motion or on summons in chambers, see *ante*, p. 148.

For representative ad litem.

(10) For a representative *ad litem*, or to dispense with a representative, see note (*m*), p. 202, *ante*.

(11) For guardian's or receiver's accounts, *Re Burke*, 1 B. & B. 74.

(12) For further time, where time has expired, *Bartlett* v. *Harton*, 17 Beav. 479 (see p. 146, *ante*, head 8).

(B.) IN A MATTER.

The following applications *in a matter* are usually made by motion.

For account of debts.

(1) For accounts under Sir G. Turner's Act, sect. 19, *ante*, p. 126, note (*u*).

Guardian ad litem.

(2) For a guardian *ad litem*, in a special case, note (*e*), p. 119, *ante* (see head (10), *supra*).

Production of cestui que vie.

(3) For production of *cestui que vie*, under 6 Anne, c. 18, see Seton, 5; Daniell, 1843; *Ex parte Lord Abergavenny*, 6 N. R. 334.

Under Trustee Acts.

(4) For vesting orders under the Trustee Acts, in pursuance of a previous petition, see note (*b*), p. 105, and (*i*), p. 114, *ante;* (where a decree has been made for sale or conveyance, the application should be made in chambers: p. 544, *infra;* head (4)).

Appeal motions.

(5) To discharge or vary orders made on motion in a matter, or on petition in a clear case, *Re Daventry Hospital*, 1 M. & Cr. 279; *Re Giraud*, 11 W. R. 607, and see head (8), last page.

WHO MAY APPLY BY MOTION.

A person not a party to a suit may apply by motion in it; unless a long statement of facts is required to show his title, in which case the application must be by petition, *Jones* v. *Roberts*, 12 Sim. 180. But no person who is not interested ought to join in the motion (*Folland* v. *Lamotte*, 10 Sim. 486).

Motion in suits by information.

A motion in a suit by information must be made on behalf of the Attorney-General (*Attorney-General* v. *Wright*, 3 Beav. 447).

Pending demurrer, contempt, &c.

The pendency of a demurrer does not prevent a plaintiff from serving the defendant with a notice of motion (*Warde* v. *Claxton*, 9 Sim. 412); as to motion by a party in contempt, see note to Ord. XLII. 1, p. 609, *post*.

Motion by married woman, infant, &c.

A married woman (*Pearse* v. *Cole*, 16 Jur. 214), or infant (*Pidducke* v. *Boultbie*, 2 Sim. N. S. 223), moves by a next friend.

Notice of motion by a pauper must be signed by his solicitor, Ord. III. 1, p. 385, *ante*.

NOTICE OF MOTION.

The notice, if made in a cause, ought to state the names of the parties fully and correctly (*Davis* v. *Barrett*, 7 Beav. 171; and see *Rowlatt* v. *Cattell*, 2 Hare, 181; *Pollard* v. *Doyle*, 2 W. R. 509). And it must distinctly state what the party moving wishes to obtain by his motion, and see generally as to the form, Daniell, 1443.

The misnomer of a party in the affidavit of service will be a ground for discharging the order made thereon (*Salomon* v. *Stalman*, 4 Beav. 243).

Several objects included in one notice of motion.

Several objects may be included in the same notice of motion; such as the appointment of a receiver, and an injunction, and the payment of money into court; or the appointment of a receiver, and payment of money into court, and the production of papers. And in some cases, where separate motions are made for two objects, which might have been obtained by one motion, the Court has made a special order, directing the party making such motions to pay the extra costs occasioned by the irregular proceeding, *Hawke* v. *Kemp*, 3 Beav. 288, cited Daniell, 1443.

Several notices where necessary.

Married woman.

But where an executor after decree moves to restrain three different creditors who have commenced different actions against him, from proceeding therewith, there must be a separate notice of motion for each creditor (*Moseley* v. *Moseley*, 9 W. R. 531); and a married woman is entitled to a separate notice of a motion for a receiver of her separate estate, *Richardson* v. *De Held*, 1 N. R. 5; but not to a separate notice of a motion that she may have leave to answer separately from her husband (*ibid.*); but as to giving her notice of motion to attach her for want of answer, see note (*b*), p. 435, *ante*.

A party who has not joined in the notice of motion cannot, as a general rule,

be heard in support of a motion (*Stubbs* v. *Sargon*, 3 Beav. 408; see *Jaquet* v. *Jaquet*, 3 W. R. 543).

In disposing of the costs of a motion in a cause, the Court is generally guided by the following rules, laid down in 1823 by V.-C. Sir John Leach, 1 Sim. & St. 357 :—

COSTS OF MOTION.

1. That the party making a *successful motion* is entitled to his costs, as costs in the cause; but the party opposing it is not entitled to his costs as costs in the cause. [This rule does not apply where the motion is occasioned by the default of the moving party, see Morgan & Davey, 34, or where he is seeking an indulgence, *e.g.*, to stay proceedings pending an appeal, *ante*, p. 522.]

2. That the party making a *motion which fails* is not entitled to his costs, as costs in the cause; but the party opposing it is entitled to his costs, as costs in the cause.

3. That where a motion is made by one party, and *not opposed* by the other, the costs of both parties are costs in the cause. [This rule does not apply where the motion is rendered necessary by the other party's default, Morgan & Davey, 35, *e.g.*, on motions to dismiss for want of prosecution, p. 535, *post*, or to commit for contempt or to discharge an irregular order.]

Where no order is made as to costs.

The above rules are now followed when the order is silent as to costs; but there are exceptions: *e.g.*, where a motion for an injunction to stay the infringement of a patent was ordered to *stand over* until after the trial of an action, nothing being said as to costs, and the plaintiff failed in establishing the validity of the patent, it was held, on the bill being dismissed with costs, that the defendant's costs of the motion were costs in the cause, *Betts* v. *Clifford*, 1 J. & H. 74; and see note as to *what are included in costs of suit*, p. 536, *post*.

Where *costs of suit are* reserved till hearing.

The costs of an interlocutory motion which rests upon affidavits which may be displaced by evidence in the cause, will, as a general rule, *be reserved till the hearing* (*Waring* v. *Manchester, Sheffield, and Lancashire Railway Company*, 14 Jur. 613—616. See *Jones* v. *Batten*, 10 Hare, App. xi.). And if the costs of a motion are reserved till the hearing, care should be taken to ask for them at that time, as a general reservation of the costs of the suit until further directions will not include the costs of the motion (per V.-C. Shadwell in *Gardner* v. *Marshall*, 14 Sim. 588; see Morgan & Davey, 33, 34). And it is a useful precaution to ask that the costs may be reserved, not simply until the hearing, but until the hearing *or further* order; otherwise they could not be obtained if the bill were dismissed before the cause came to a hearing, *Rumbold* v. *Forteath*, 4 Jur. N. S. 608.

Costs of motion *partially successful.*

"It is the common course that where a party asks for something he is entitled to, and also for something that he is not entitled to, he pays the costs of the motion though he succeeds" (per Lord Langdale in *Lancashire* v. *Lancashire*, 9 Beav. 130; and see *Sturch* v. *Young*, 5 Beav. 557).

Costs not asked for by motion.

Costs may be given though not asked for by the notice of motion (*Clarke* v. *Jacques*, 11 Beav. 623; *Butler* v. *Gardiner*, 12 Beav. 525; *Dawson* v. *Jay*, 2 W. R. 598), but *semble*, not if the respondent does not appear (see *Pratt* v. *Walker*, 19 Beav. 281).

As to the costs of an abandoned motion, see Ord. XL. 23, p. 587, *post*.

Costs given to parties *served* though not interested.

Parties served with notice of motion, though not interested, will, as a general rule, be entitled to their costs of appearance (*Heneage* v. *Aikin*, 1 J. & W. 377; *Barnford* v. *Wates*, 2 Beav. 202; *Maior* v. *Major*, 13 Jur. 1, corrected *ibid.* 202. Compare the practice as to giving costs of parties served with a petition, note (*a*) to Ord. XXXIV. p. 542, *post*.

A party not formally served with notice of motion, but substantially served, will be entitled to his costs, if the motion be refused with costs, *Shaw* v. *Forest*, 20 Beav. 249; Morgan & Davey, 45.

Appeal motion.

A motion may be renewed before the Court of Appeal, and upon fresh evidence, see Daniell, 1369; but an appeal motion made on new facts and evidence is, with reference to costs, a new motion (*Re Joseph and Webster*, 1 R. & M. 496).

As to evidence on motions, and the affidavit of service, see note (*d*), p. 464, *ante*.

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When an order is made on motion, counsel's brief with his indorsement, the notice of motion (if any) annexed, and office copies of any affidavits, and any exhibits or other evidence used at the hearing of the motion, must be left with the registrar on bespeaking the order (31st Registr. Regul., March, 1860, Appendix, p. lxxxv., *post*).

EVIDENCE ON MOTION.

Affidavit of service.

Order on.

An order made on affidavit of service must not add to (*Pratt* v. *Walker*, 19 Beav. 281) or depart from the terms of the notice (*Hutton* v. *Hepworth*, 6 Hare, 315); and the order will be liable to be discharged if there be any irregularity in the notice (*Moody* v. *Hebberd*, 11 Jur. 941) or affidavit (*Saloman* v. *Stalman*, 4 Beav. 243) on which it is founded. Where the affidavit of service is imperfect, a new notice must be given (*Barton* v. *Chambers*, 4 Beav. 547). After order made on affidavit of service, the opposite side can only move to discharge it (*Mapp* v. *Elcock*, 22 L. J. Ch. 707).

EX PARTE MOTIONS.

(1) In urgent cases;

(2) In some matters of procedure;

(3) Where notice cannot be given.

(*b*) For *special* applications, which may be made *ex parte, without notice of motion*, see Daniell, 1909. They are generally—

(1) Applications of a very *urgent* nature; see as to *ex parte* injunctions, p. 505, *ante*, and under this head come also applications for leave to give notice of motion for a day not a seal day.

(2) Applications for orders *nisi*, or for leave to take some proceeding which under some Act, or general order, or established rule of practice, the Court has a discretion to allow without hearing the other side, *e.g.*, for leave to amend a bill before answer, Ord. IX. 8, p. 410, *ante;* to be heard in opposition to a petition under the Settled Estates Act, sect. 20 of the Act, p. 246, *ante;* to *advance a cross cause* to come on with the original cause; for an inquiry which of two suits is most for an infant's benefit; to prove exhibits, which were not made evidence at the hearing, on a re-hearing, note (*b*), p. 521, *ante;* to sue, appeal, &c., *in formâ pauperis*, p. 404, *ante;* to dispense with, or appoint, a representative *ad litem*, note (*m*), p. 202, *ante*.

(3) Applications where the opposite party has not appeared or is absconding, *e.g.*, for substituted service, or further time for service (Ord. X. 18, p. 430, *ante*); to take steps towards taking bills *pro confesso;* for writs of attachment, *ne exeat*, sequestration, &c., and in case of married women answering separately, see note (*b*), p. 435, *ante*.

(*c*) See *ante*, Ord. VI. 5, 6, 9, and notes.

Rule 2. Time for service.

2. Unless the Court give special leave to the contrary (*d*), there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion. And in the computation of such two clear days, Sundays and other days on which the offices are closed, except Monday and Tuesday in Easter week, shall not be reckoned (8th May, 1845; Ord. 16, Art. 47).

Leave must be stated.

Short notice.

Time for motions of course.

(*d*) The leave, which may be obtained on *ex parte* motion, must be stated in the notice of motion (*Hill* v. *Rimell*, 2 M. & Cr. 641).

As to short notice of motion, see *Hart* v. *Tulk*, 6 Hare 611; Daniell, 1508; and note (*b*), head (1), *supra*.

Motions of course may be made on any day, in or out of term, *Lord Harborough* v. *Wartnaby*, 1 Ph. 364.

Rule 3. Time for service of notice of motion for

3. There must be at least six clear days between the service of a notice of motion by the plaintiff for the appointment of a guardian by whom a defendant who is

an infant or a person of weak intellect or unsound mind may defend the suit, and the day named in the notice for hearing the motion (8th May, 1845 ; Ord. 16, Art. 48).

a guardian to defend suit on behalf of infant, &c.

II. *Motion for Decree under the Stat.* 15 & 16 *Vict. c.* 86, *s.* 15 (*e*).

Rule 4. Month's notice of motion for decree.

4. One month's notice (*f*) shall be given by the plaintiff to the defendant, of a motion under the Stat. 15 & 16 Vict. c. 86, s. 15, for a decree or decretal order (7th Aug. 1852 ; 1st Set, Ord. 22).

(*e*) As to the practice of moving for a decree, see sect. 15 of the Chancery Amendment Act, 1852, *ante*, p. 169, and notes.

Service of notice of motion for decree abroad, &c.

(*f*) Notice of motion for decree may be served *out of the jurisdiction*, see note (*q*), p. 425, *ante*. But *substituted service* of the notice is not allowed, note (*c*), p. 420, *ante*. See, however, the same note, as to advertisement of replication.

Evidence of service.

A letter from the solicitor of a party out of the jurisdiction acknowledging the receipt of a notice of motion, but without saying that he would be bound by it, is not a sufficient proof of the service of the notice under this section (*Mendes* v. *Guedalla*, 5 L. T. N. S. 308).

Short notice, &c.

By consent, the motion may be heard before the month is expired (*Loinsworth* v. *Rowley*, 10 Hare, App. lv.) ; and in a proper case a motion for decree may be heard as a *short cause*, 10th Registr. Regul., March, 1860, Appendix, p. lxxxii. *post* ; *Ames* v. *Ames*, 10 Hare, App. liv.

Entering and setting down motion for decree.

When a motion for an injunction was by consent turned into a motion for a decree, it was held that it must be set down *by order*, to save the month's delay (*Green* v. *Low*, 22 Beav. 395 ; and see *Loinsworth* v. *Rowley*, l. c.).

See further as to setting down, note (*k*), next page.

Rule 5. Plaintiff's affidavits when to be filed.

5. The affidavits (*g*) to be used in support of such motion shall be filed before the service of such notice, and a list of such affidavits shall be set forth at the foot of such notice (7th Aug. 1852 ; 1st Set, Ord. 23).

(*g*) As to evidence on motion for decree, see note (*h*), pp. 169, 170, *ante*.

Rule 6. Defendant's affidavits when to be filed.

6. The defendant, within fourteen days after service of such notice (*h*), shall file his affidavits in answer, and deliver to the plaintiff or his solicitor a list thereof (7th Aug. 1852 ; 1st Set, Ord. 24) (*i*).

When defendant abroad.

(*h*) As to cases where the defendant is abroad, see *Meek* v. *Ward*, 10 Hare, App. lv., and as to cases where the period of fourteen or seven days expires during vacation, see Ord. XXXVII. 15, p. 571, *post*.

Enlarging time, &c.

(*i*) The Court will not enlarge the time for the defendant to file his affidavits, simply because he wishes to cross-examine the plaintiff's witness (*Marchioness of Londonderry* v. *Bramwell*, 3 K. & J. 162 ; *Edwards* v. *Spaight*, 2 J. & H. 617) ; and as to enlarging time for evidence, see note (*k*), p. 191, *ante*.

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7. Within seven days after the expiration of such fourteen days, or other period for which the time for filing the defendant's affidavits has been enlarged, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply; and he shall deliver to the defendant or his solicitor a list thereof; and except so far as these affidavits are in reply, they shall not be regarded by the Court, unless upon the hearing of the motion the Court shall give leave to the defendant to answer them, and in that case the costs of such affidavits, and of the further affidavits consequent upon them, shall be paid by the plaintiff, unless the Court shall otherwise direct (7th Aug. 1852; 1st Set, Ord. 25).

Plaintiff's affidavits in reply when to be filed.

Costs.

Rule 8. No further evidence without leave.

8. No further evidence on either side shall be used upon such motion for a decree or decretal order without leave of the Court (7th Aug. 1852; 1st Set, Ord. 26) (*j*).

(*j*) See as to enlarging the time for taking evidence, note (*k*), p. 191, *ante*.

Rule 9. Notices of motion for decree, how entered and heard.

9. Every notice of motion for a decree or decretal order shall be set down (*k*) with the Registrar in the cause-book with the causes, and shall come on to be heard accordingly, unless the Court shall otherwise direct (7th Aug. 1852; 1st Set, Ord. 27).

When motion for decree is to be set down.

(*k*) The motion is to be set down within a week after the expiration of the time allowed for affidavits in reply by rule 7, *supra*; or, if the defendant filed no affidavits in answer, then within a week after the expiration of the time allowed for them by rule 6, *supra*, but in case the time allowed for either of the purposes aforesaid shall be enlarged, then within one week after the expiration of such enlarged time, Ord. 22 Nov. 1866, r. 2, p. 647, *post*. It is to be set down upon production of the Record and Writ Clerk's certificate (see rule 3 of same order), that the cause is in a fit state to enable the plaintiff to move for a decree, indorsed by the plaintiff's solicitor with a memorandum of the date when the notice was served and the date when it will expire, and if there be any infant defendant, stating that a guardian *ad litem* has been appointed; or if there be not, stating that there is not any infant defendant. (6th Registr. Regul., March, 1860, and notes, Appendix, p. lxxxi. *post*.)

Defendant's option to set cause down or move to dismiss.

If the plaintiff fails to set down a motion for decree in due time, the defendant has an option either to move to dismiss the bill, or to set the cause down himself, Ord. 22 Nov. 1866, r. 3, p. 647, *post*; and so if the plaintiff fails to set down a cause, see Ord. XXI. 1, p. 470, *ante*.

III. *Motions to dismiss Bills* (*l*).

Rule 10. Time for motion to dismiss

10. Any defendant may, upon notice (*m*), move the Court that the bill may be dismissed with costs for

want of prosecution, and the Court may order accordingly (*n*).

for want of prosecution. Article (1).

(1.) Where the plaintiff, having obtained no order to enlarge the time, does not, within four weeks (*o*) after the answer or the last of the answers (*p*) required to be put in by such defendant is held or deemed to be sufficient, or after the filing of a traversing note against such defendant, file the replication, or set down the cause to be heard on bill and answer, or *serve a notice of* (*q*) *motion* for a decree or decretal order, or obtain and serve an order for leave to amend the bill; or

Article (2).

(2.) Where the plaintiff, having undertaken to reply to a plea filed by such defendant to the whole bill, does not file his replication within four weeks after the date of his undertaking (*r*); or

Article (3).

(3.) Where the plaintiff, having obtained no order to enlarge the time, does not set down the cause to be heard, and obtain and serve a *subpœna* to hear judgment within four weeks after the evidence has closed (*s*) (8th May, 1845; Ord. 114; and Ord. 16, Arts. 37, 45).

(*l*) A bill may be dismissed or proceedings stayed by any defendant in the following cases:—

Bill may be dismissed.

(1) Where the plaintiff has been ordered to give security for costs, (see Ord. XL. 6, p. 578, *post*,) or to pay the costs of former proceedings instituted by him and abandoned, and has not done so, *Altree* v. *Horden*, 5 Beav. 623; *Spires* v. *Sewell*, 5 Sim. 193; *Pickett* v. *Loggan*, 5 Ves. 705; but see *Budge* v. *Budge*, 12 Beav. 385; Daniell, 737.

(1) Where plaintiff has not paid costs of former proceedings.

(2) Where two suits are instituted for the same matter (note (*a*), page 393).

(2) Two suits for same purpose.

(3) For want of prosecution, as in the text.

A defendant cannot, except in the cases mentioned above, move to dismiss a bill before answer, for every plaintiff has a right to have his bill answered if it cannot be demurred or pleaded to, see note (*a*), p. 450, *ante*.

(3) For want of prosecution.

But a defendant may disclaim (see note (*a*), p. 407, *ante*); and as to disclaiming defendants, see *Maxwell* v. *Wightwick*, 3 L. R. Eq. 210.

As to a plaintiff dismissing his own bill, see note (*o*), p. 491, *ante*; and Daniell, 735, 741, for cases where he may do so without costs.

(*m*) As to form of notice, see p. 530, *ante*.

(*n*) The common order is that the plaintiff speed the cause, and in default, that the bill be dismissed with costs, *Pearce* v. *Wrigton*, 24 Beav. 253; as to the order in case of a foreclosure suit, see *Challie* v. *Gwynne*, Kay, App. xlvi.

Common order on motion to dismiss for want of prosecution.

Where the plaintiff had not filed a replication, and tendered costs before the motion, the Court gave him a week to file a replication, or three weeks to move for a decree, and ordered him to elect which course he would pursue by the next morning (*Williams* v. *Rowland*, 3 Jur. N. S. 658). And in a fair case (*e. g.* when the delay has been unavoidable, and the plaintiff may obtain justice by going into evidence), the Court will give the plaintiff further time

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upon his payment of the costs and submitting to limited terms (*Pollard* v. *Doyle*, 2 W. R. 509, V.-C. K. ; but see *Lever* v. *Heritage*, 5 Jur. N. S. 215 ; *Freeston* v. *Claydon*, 22 L. J. Ch. 640 ; *Hancock* v. *Rollison*, 8 W. R. 18.

Further time how applied for.

The plaintiff will generally be held to his first undertaking, *La Mert* v. *Stanhope*, 5 De G. & Sm. 247 ; but he may apply for further indulgence by summons (*ibid.*), or if the time has actually expired, by motion, *Bartlett* v. *Harton*, 17 Beav. 479. See p. 530, *ante*, head (12).

Speeding action at law.

As to speeding an action where a cause has been retained, with liberty to proceed at law, see *Arnold* v. *Thompson*, 11 W. R. 52.

Dismissal of bill is *with* costs.

The dismissal in default of speeding the cause is *with* costs, and it makes no difference that the defendant has become bankrupt since the suit was instituted (*Lever* v. *Heritage*, 26 Beav. 560; overruling *Blanshard* v. *Drew*, 10 Sim. 240 ; and see *Haddon* v. *Pegler*, 5 Jur. N. S. 1123) ; or that nothing was said as to costs in the order, *Stevenson* v. *Mackay*, 24 Beav. 252 ; and see *Williams* v. *Page*, 24 Beav. 490.

Unless motion was unfair.

But where a defendant moves to dismiss, knowing that the plaintiff has used due diligence, the Court will refuse to make any order on the motion, *Ingle* v. *Partridge*, 33 Beav. 287. See Daniell, 749.

Costs of motion.

The costs of the motion are generally paid by the plaintiff, especially if further time is allowed him, *Young* v. *Quincey*, 9 Beav. 160 ; see p. 531, *ante* ; but if the defendant moves unfairly he may have to pay the costs, *Ingle* v. *Partridge*, l.c. ; *Barker* v. *Piele*, 12 W. R. 460.

What costs are included in costs of suit dismissed for want of prosecution.

As to the costs included under the costs of a bill dismissed for want of prosecution, see *Finden* v. *Stephen*, 12 Jur. 319 ; reversing s. c. 11 Jur. 898 ; *Stevens* v. *Keating*, 1 M. & G. 659 ; *Rumbold* v. *Forteath*, 4 Jur. N. S. 608 ; *Betts* v. *Clifford*, 1 J. & H. 74.

And see generally as to the costs, Morgan & Davey, 37.

Bill will *not be dismissed*

The order cannot be obtained to dismiss the plaintiff's bill ;

(1) If a *decree* has been made.

1. If a decree has been made in the cause ; but a decree merely interlocutory, or for inquiries, is no bar to the dismissal, *Bluck* v. *Colnaghi*, 9 Sim. 411 ; but a reference as to title was held to prevent the order being made, *Gregory* v. *Spencer*, 11 Beav. 143 ; *Collins* v. *Greaves*, 5 Hare, 596. See, however, *Norton* v. *White*, 2 D. M. G. 678.

(2) If *notice* was *irregular*.

2. If the defendant gave notice for too early a day, even though the motion itself is postponed to the regular time, *Ponsardin* v. *Stear*, 32 Beav. 666.

(3) If proceedings are stayed plaintiff or defendant being *in contempt*.

3. If an order is pending to stay proceedings till the plaintiff clears his contempt, *Futvoye* v. *Kennard*, 2 Giff. 533 (but see *contra*, *Kennedy* v. *Edwards*, 11 Jur. N. S. 153) ; or if the defendant is in contempt when he moves, *Anon.*, 15 Ves. 174 ; and see *Howe* v. *Grey*, 2 W. N. (1867), 141.

(4) If plaintiff amends, replies, &c., *tendering costs*.

4. If the plaintiff obtains an order to amend (see Ord. IX. 12, p. 413, *ante*) or files replication (but see *Henley* v. *Abraham*, 5 Hare, 214) ; or sets down the cause (*Story* v. *Official Manager of National Insurance Company*, 8 L. T. N. S. 534 ; *Hand* v. *King*, 10 Jur. N. S. 91) ; *tendering the full costs* up to that time (see *Hughes* v. *Lewis*, Johns. 696 ; *Jones* v. *Jones*, 10 Jur. N. S. 1167). If the plaintiff does not tender such costs, the defendant may bring his motion on for the costs, *Corry* v. *Curlewis*, 8 Beav. 606 ; *Lester* v. *Archdale*, 9 Beav. 156 ; but see *Steedman* v. *Poole*, 11 Jur. 555.

Bill *may* be dismissed—

But it is no answer to the motion to dismiss—

(1) Though defendant is insolvent,

1. That the defendant is insolvent, and that the plaintiff was therefore justified in discontinuing useless litigation.

(2.) Though plaintiff is outlawed.

2. That the plaintiff is an outlaw, *Knowles* v. *Rhydyfeded Colliery Company*, Johns. 630.

(3) or has not got in answer, &c.

3. That the plaintiff has experienced some difficulty in the conduct of the suit, *e.g.* in drawing up an order, *Jones* v. *Morgan*, 12 Jur. 388 ; or in paying costs which he had been ordered to pay, *Kennedy* v. *Edwards*, 11 Jur. N. S. 153. Nor is it enough to show that he has not got in an answer, or documents for which he has applied ; he must show that he has used due diligence to get them, *Earl Mornington* v. *Smith*, 9 Beav. 251 ; *Franco* v. *Meyer*, 2 H. & M. 42 ; and see *Jones* v. *Jones*, 3 W. R. 638 ; *Baldwin* v. *Damer*, 11 Jur. 723 ; *Briggs* v. *Beale*, 12 W. R. 934 ; *Knowles* v. *Rhydyfeded Colliery Company*, Johns. 514 (but a motion to dismiss by one defendant, whose co-defendant *appearing by the same solicitor* had not answered, was refused

with costs, *Winthrop* v. *Murray*, 7 Hare, 150; *Nicholl* v. *Jones*, 14 W. R. 79.)

4. That the defendant has filed cross-interrogatories which plaintiff has applied for more time to answer, *Jackson* v. *Ivimey*, 1 L. R. Eq. 693; or that another defendant has filed a cross bill, *Wyndham* v. *Cooper*, 14 W. R. 8 (see, however, *Talbot* v. *Marshfield*, cited Ayckb. 319); or that the defendant has filed a voluntary answer, *Weeks* v. *Heward*, 11 W. R. 79.

(4) or though defendant has filed cross interrogatories, or voluntary answer.

(*o*) The four weeks expire at twelve at night on the last day, *Preston* v. *Collett*, 20 L. J. Ch. 228; Ord. XXXVII. 9, 19, *post*.

(*p*) See note (*r*), p. 413, *ante*.

(*q*) The words in italics were altered by Ord. 22 Nov. 1866, p. 646, *post*.

(*r*) If the plaintiff does not within three weeks undertake to reply to a plea to the whole bill, the defendant may obtain an order of course to dismiss under Ord. XIV. 17, p. 431, *ante*.

Where plaintiff does not *undertake* to reply to plea.

As to the four weeks, see note (*o*), *supra*.

Four weeks.

(*s*) As to the meaning of these words, see note (*a*), p. 470, *ante*, from which it appears that a defendant cannot move to dismiss under this rule, while the plaintiff has a right to cross-examine a witness. See, also, note (*o*), *supra*.

Rule 11. Order to amend bill when void.

11. Where the plaintiff obtains an order for leave to amend his bill, and having obtained no order to enlarge the time, does not amend the bill within the time limited by the order to amend, or if no time be limited, then within fourteen days from the date of such order (*u*) the order to amend shall be void, and the cause shall as to dismissal stand in the same position as if such order to amend had not been made (*v*) (8th May, 1845; Ord. 16, Art. 34; and Ord. 70 and 114).

(*u*) See Ord. IX. 17 and 24, pp. 415, 417, *ante*.

The fourteen days do not run during vacation, Ord. XXXVII. 13, p. 570, *post*.

Dismissal *ex parte*.

(*v*) When the order was that the plaintiff should amend within a month, and in default that the bill be dismissed, an order to dismiss made *ex parte* was held regular (*Dobede* v. *Edwards*, 11 Sim. 454). So where a demurrer is filed and before it comes on for argument the plaintiff obtains the common order to amend, but does not amend within the time specified, the bill is gone (*Hoflick* v. *Reynolds*, 30 L. J. Ch. 407).

Where a time was named within which plaintiff should amend, but the order did not direct the bill to be dismissed if not amended within such time, defendant was allowed to move on notice that the bill, unless amended within a certain time, should be dismissed with costs, *Emerson* v. *Emerson*, 6 Hare, 442 (see note (*h*), p. 490, *ante*); and where no time was named within which the plaintiff should amend, and on the plaintiff taking no steps to amend, the defendant moved that he should amend within fourteen days, or that the bill should be dismissed; though the plaintiff afterwards amended he had to pay the costs of the defendant's application, *Tampier* v. *Ingle*, 1 N. R. 159.

Motion to fix time to amend where none fixed originally.

Rule *12. Time for motion to dismiss for want of prosecution, where plaintiff amends bill after answer, without

*12. Any defendant may upon notice move to dismiss the bill, with costs, for want of prosecution, where the plaintiff, after answer, amends his bill without requiring an answer to the amendments (*w*), and, having obtained no order to enlarge the time, does not file the replication, or set down the cause to be heard on bill and answer or

ORDER XXXIII. Motions.

serve a notice of (*x*) *motion* for a decree or decretal order, within the times following, viz. :—

requiring answer to amendments.

Article (1).

(1.) Within one week after the expiration of the time within which such defendant might have put in an answer, in cases where the defendant does not desire to answer the amendments (*y*).

Article (2).

(2.) Within fourteen days after the refusal to allow further time, in cases where the defendant, desiring to answer, has not put in his answer within the time allowed for that purpose, and the judge has refused to allow further time.

Article (3).

(3.) Within fourteen days after the filing of the answer, in cases where the defendant has put in an answer to the amendments, unless the plaintiff has within such fourteen days obtained a special order for leave to except to such answer or to re-amend the bill (8th May, 1845 ; Ord. 115 ; and Ord. 16, Arts. 39, 40, 41).

Where plaintiff amending requires answer.

(*w*) Where a plaintiff amends and requires an answer, rule 10, article 1 (p. 535, *ante*), applies.

Where from *some* of the defendants only.

Where a plaintiff amends and requires an answer to the amendments from some but not from all of the defendants, the defendants who are not required to answer may move to dismiss for want of prosecution, if the plaintiff, after getting in the other defendant's answers, delays taking any step in the cause for so long a time as to warrant the conclusion that he does not intend to bring the cause to a hearing, *Forbes* v. *Preston*, 5 N. R. 360 ; and see *Temple* v. *Holland*, 1 N. R. 504 ; *Raistrick* v. *Elsworth*, 2 De G. & Sm. 95. See, however, *Brown* v. *Rutter*, 21 Beav. 615, where the plaintiff required A. but not B. to answer amendments, and B., who did not desire to answer them, moved to dismiss after fourteen days, and the Master of the Rolls refused the motion, holding that such a case was not within the order of May, 1845 ; but in that case there were special circumstances which would have made it unjust to dismiss the bill, see remarks of V.-C. Stuart in *Forbes* v. *Preston* (l. c.).

(*x*) See note (*q*), p. 537, *supra*.

Time for voluntary answer to amendments.

(*y*) The time for putting in an answer to an amendment where no answer is required is thirty days from service of the amendments, see Ord. XXXVII. 7, p. 568, *post*, and note.

Computation of time.

The vacations are not to be reckoned in the computation of the time limited by this article (Ord. XXXVII. 13 (4), p. 570, *post*).

Rule 13. Time for motion to dismiss for want of prosecution, where no answer required or put in.

13. A defendant to a suit commenced by bill, who shall not have been required to answer the bill, and shall not have answered the same, shall be at liberty to apply for an order to dismiss the bill for want of prosecution, at any time after the expiration of three months (*z*) from the time of his appearance, unless a *notice of motion* for a decree or decretal order shall have been *served* (*a*) in

ORDER XXXIII. Motions.

the meantime, or the cause shall have been set down to be heard; and the Court may, upon such application, if it shall think fit, make an order dismissing the bill, or make such other order or impose such terms as may appear just and reasonable (*b*) (7th Aug. 1852; 1st Set, Ord. 29).

(*z*) In the computation of these three months, vacations are reckoned, see Ord. XXXVII. 13, and note p. 570, *post*.

Three months run during vacation.

(*a*) See note (*q*), p. 537, *ante*.

(*b*) The Court, under this rule, has a discretion conferred on it to dismiss the bill, or to allow the plaintiff further time. Where, therefore, a bill was filed against several defendants, one only of whom (who was not required to answer) had appeared, the Court permitted that defendant to move to dismiss the plaintiff's bill at the end of three months, but ultimately gave the plaintiff further time, *Bothomley* v. *Squire*, 7 D. M. G. 246; and comp. *Gill* v. *Rayner*, 1 K. & J. 395, 397; *Waters* v. *Thorne*, 26 L. T. 57; *Osborne* v. *Bright*, 30 L. T. 101; and *Haddon* v. *Pegler*, 5 Jur. N. S. 1123).

Discretion of Court under this rule.

The orders do not in terms allow a defendant, who not being required to answer, has nevertheless put in a *voluntary answer* to apply to dismiss the bill, but it seems from *Bentley* v. *Mercer*, 6 W. R. 265 (V.-C. Wood), that such a defendant may move after three months from appearance.

Where defendant files *voluntary answer*.

It appears to be doubtful whether a defendant who has not been required to answer the bill, and has not done so, can under this rule move to dismiss the bill for want of prosecution *after a replication has been filed*.

Where no answer required and replication is filed.

A motion to dismiss for want of prosecution a bill for discovery only (*South Eastern Railway Company* v. *Submarine Telegraph Company*, 23 L. J. Ch. 183); a bill to perpetuate testimony (*Wright* v. *Tatham*, 2 Sim. 459); or a bill to appoint a receiver *pendente lite* (*Edwards* v. *Edwards*, 22 L. J. Ch. 1054), is irregular.

Motion to dismiss particular kinds of bills irregular.

ORDER XXXIV.

ORDER XXXIV. Petitions.

Petitions (*a*).

Rule *1. Statement of persons to be served.

*1. At the foot of every petition (not being a petition of course) presented to the Lord Chancellor or the Master of the Rolls, and of every copy thereof, a statement shall be made of the persons, if any, intended to be served therewith (*b*); and if no person is intended to be served with such petition, a statement to that effect shall be made at the foot of the petition, and of every copy thereof (30th March, 1859; Ord. 16).

(*a*) As to petitions of right, see note (*a*) to Ord. 1st Feb. 1862, *post*.

As to appeal petitions, see p. 529, head (8), and head (2) next page.

PETITIONS OF COURSE.

Petitions, like motions (p. 529, *ante*), are either of course, or special. The practice has become general for orders of course, even in causes attached to the courts of the Vice-Chancellors, to be made upon petition at the Rolls (Daniell, 1438), and see note (*l*), p. 17, *ante*, as to applications *of course* for taxation of costs; but as to petitions of course to the Lord Chancellor, see Ord. XXI. 9, *ante*, p. 472, and 3rd Registr. Regul., March, 1860, Appendix, p. lxxx. *post*.

ORDER XXXIV. Petitions.

As to the consequences of suppression of any material facts on an application obtained *ex parte* and as of course, see note (*m*), p. 17, *ante* (taxation of costs), and note (*k*), p. 215, *ante* (revivor).

Orders how drawn up, passed, and entered.

On any petition of course presented to the Master of the Rolls (except petitions for setting down causes to be reheard), one of the secretaries of the Master of the Rolls will, instead of answering it, draw up the order thereon in such form as the Master of the Rolls may direct; and will sign every such order as passed with his initials. Every such order is entered in a book kept at the Secretary's office at the Rolls for that purpose, and is marked and signed with the initials of the secretary as entered (Daniell, 1455).

Special petitions are presented. (A.) In a *cause*. (B.) In a *matter* (under the statutory or ordinary jurisdiction of the Court).

(A.) PETITIONS IN A CAUSE.

(A.) *In a cause*; and as to the title of a petition in a cause, see Daniell, 1453. In *Weeding* v. *Weeding*, 1 J. & H. 421, a fund was transferred from one cause to another on a petition entitled only in the first.

As to what applications in a cause should be made by motion, and what by petition, see note (*a*), p. 529, *ante*, and *Lord Shipbrooke* v. *Lord Hinchinbrook* there cited. They are such as the following :—

For payment of money out of court.

(1) For payment of money out of court, *Spencer* v. *Lord Mostyn*, 11 Jur. 234, except in a very clear case, see p. 529, head (2), *ante*; and as to applications for sums under 300*l.* being made by summons in chambers, see note (*a*), p. 544.

To vary orders or decrees.

(2) To vary orders made on petitions, or to correct clerical errors, under Ord. XXIII. 21, *ante*; and as to supplying directions in a decree by petition, see *Winter* v. *Jones*, 4 M. & Cr. 101.

To enforce a compromise or undertaking

(3) To enforce *compromises* entered into out of court, see *Forsyth* v. *Manton*, 5 Madd. 78; *Dawson* v. *Newsome*, 2 Giff. 272; but where there is a dispute as to counsel's authority, or the agreement goes beyond the purview of the suit, a new bill is necessary, *Askew* v. *Millington*, 9 Hare, 65; *Green* v. *Crockett*, 13 W. R. 1052; *Richardson* v. *Eyton*, 2 D. M. G. 79.

Or to enforce an undertaking by a party to the suit, *Sidefield* v. *Thacker*, 18 Beav. 588.

to carry out decrees.

(4) To carry decrees and orders into effect in complicated cases.

To *wind up a suit.*

(5) To wind up suits, the further consideration of which has become unnecessary (see *Winthrop* v. *Winthrop*, 1 Coop. 201; *Harrison* v. *Lane*, 2 Sm. &. G. 249; *Thompson* v. *Knight*, 9 W. R. 780).

(B.) IN A MATTER.

(B.) Under the statutory or general jurisdiction of the Court, *e. g.* applications relating to *charities*, see Seton, 353; *Re Duncan*, 2 L. R. Ch. 356; but see, also, note (*o*), p. 98, *ante*, and (*f*), p. 598, *post*: or for marriage of ward of court, Daniell, 1232; but see p. 146, head (3), *ante*.

Under general, or statutory jurisdiction without suit.

As to the titles of petitions under the statutory jurisdiction, see Ayckbourn, 302, and note (*i*), p. 27, note (*o*), p. 98, *ante*.

As to what questions can be considered on a petition without suit, see note (*o*) to sect. 2 of the Trustee Relief Act, p. 71, *ante*; note (*h*) to sect. 30 of the Trustee Act, 1850, p. 96, *ante*, and note (*q*), to sect. 30 of Lord St. Leonards' Act, 1859 (application by trustees for advice of Court), p. 283, *ante*.

As to petitions under the Trustee Relief Act, see note (*p*), p. 72; under the Trustee Act, notes (*x*) and (*y*), p. 103, 104, *ante*.

Petition of Right.

As to petitions of right, see p. 631, *post*.

WHO MAY PETITION.

As to petitions by parties under commitment, see *Nicholson* v. *Squire*, 16 Ves. 259, cited in note (*a*), to Ord. XLII. 1, p. 609, *post*.

Party in contempt.

Petitions by infants (*Howard* v. *Prince*, 14 Beav. 28, and see p. 371, *ante*), or married woman (*Jones* v. *Lewis*, 1 De G. & Sm. 245; but see *Crouch* v. *Waller*, 4 De G. & J. 43), are presented by a next friend. A lunatic petitions by his committee.

Persons under disability.

FORM OF PETITION.

A petition must be fairly written upon paper, but it need not be written upon parchment. Except it be for a rehearing, or appeal, it is not signed by counsel, nor need it be prepared by one; but by Ord. XL. r. 32, *post*, the Taxing Master is to allow, on taxation between party and party, the costs of such petitions as appear to have been proper to be settled by counsel.

Answering of petitions, &c.

"A petition addressed to the Lord Chancellor must be left with his principal secretary, and, if it is not for a matter of course, it will be answered by a memorandum, written in the margin of the petition, and signed by such secretary, directing all parties concerned to attend before him on the next day of petitions, unless, upon previous application either to his lordship or a Vice-Chancellor, permission has been given to have the petition answered for an earlier day. When the petition is answered it is taken away by the person presenting it, and the copy is forwarded from the secretary's office to the judge by whom the petition is to be heard.

"A petition addressed to the Master of the Rolls must be left with his under-secretary, and, if it is not of course, it will be answered in the same manner as a petition addressed to the Lord Chancellor" (Daniell, 1454, 5).

Name and address of petitioner, &c.

A petition in a matter must state the name and address of the petitioner. So if presented in a cause by a person not a party (*Glazbrook* v. *Gillatt*, 9 Beav. 492).

Security for costs.

As to the cases in which a petitioner will or will not be ordered to give security for costs, see notes pp. 578—580, *post*.

Solicitor's authority to present.

A solicitor before he presents a petition ought to have a general authority to act for a party in the suit; or a particular one to present the petition; but see *Tarbuck* v. *Tarbuck*, 6 Beav. 134.

Statements in petition.

A petition must contain in itself all the facts and circumstances which give the Court jurisdiction (*Re Hartford*, 2 Dru. & War. 292), or upon which it is called upon to interfere (*Re Briscoe*, 2 Dru. & War. 501).

Petitions as to funds not dealt with for 15 years.

By an order of Lord Cranworth, made in January, 1855, it was provided that where a petition sought to deal with a fund in court which had not been dealt with for fifteen years, that fact ought to be stated in the petition. The practice under this order seems to be saved by the Prel. Ord. 5, though the order is not reprinted.

Before what Court set down.

As to the judge before whom the petition is to be set down and heard, see Ord. VI. 6, *ante*, p. 396, and as to the jurisdiction, where a fund belonging to a *lunatic* is in court *in a cause*, see *Davies* v. *Davies*, 2 D. M. G. 51, and under the Trustee Relief Act, see note (*o*), p. 70, *ante*, and under the "Trustee Act, 1850," see note (*q*), p. 81, *ante*.

In matters of lunacy.

HEARING OF PETITIONS.

Pre-audience.

Where two petitions are presented in the same matter, the petition first presented is entitled to be first opened (*Re Mallorie*, 1 Hall & Tw. 435); where two petitions are presented on the same day, that which is first answered has pre-audience (*Re Brookman*, 1 M. & G. 199). See further, as to precedence between two petitioners, *Sturgis* v. *Paley*, 14 Sim. 599.

Amendment.

A petition after it has been stamped and answered may be amended by adding a co-petitioner without a fresh stamp (*Robinson* v. *Hewetson*, 1 Drew. 307), and without re-answering (*Re Cartwright*, 8 W. R. 492; and see *Maude* v. *Maude*, 5 De G. & Sm. 418; *Re Medow*, 12 W. R. 595). The 15 & 16 Vict. c. 86, s. 53, p. 216, *ante*, as to introducing subsequent facts by way of amendment, applies to petitions (*Robinson* v. *Hewetson*, *ante*).

At or after hearing.

A petition may by consent be amended at the hearing (*Matson* v. *Swift*, 8 Beav. 368); but not after the order is drawn up (*Re Marrow*, Cr. & Ph. 141); see, however, *Re Burrett*, 1 Jur. N. S. 921; nor can a fact inconsistent with an existing order be introduced by amendment (*Re Keen*, 7 W. R. 577); see Daniell, 1459. But see *Re Havelock's Trusts*, 14 W. R. 26, 174, where new facts occurred between the pronouncing and drawing up of the order, and a supplemental order was made on the petition as amended.

Petition struck out or dismissed.

A petition struck out must be set down again before it can be heard (*Ex parte Piper*, 2 L. J. Ch. 168). If the petitioner does not appear, the petition will on production of affidavit of service by respondent having an interest in the order, be dismissed with costs (*Dunbar* v. *Boldero*, 2 Madd. 581).

Standing over.

"Where an unopposed petition stands over without a day being fixed for it to be again put into the paper, the registrar in attendance in court, upon the written request of the solicitor, will direct the same to be restored to the paper, for the following petition day" (14th Registr. Regul., March, 1860, Appendix, p. lxxxii. *post*).

Evidence on petitions.

The evidence on a petition is taken by affidavit, and a witness making the affidavit may be cross-examined (*Re Bendyshe*, 5 W. R. 816). Affidavits filed

ORDER XXXIV. Petitions.

in a cause may be used on a petition, see note (*a*), *ante*, p. 464 ; and as to the solicitor's affidavit being sufficient evidence of the state of a family, &c., see *Re Hoskins*, cited p. 96, note (*i*).

EVIDENCE ON PETITIONS.

All persons interested should be served with notice of the petition. Thus a petition for payment out to the assignee of a fund standing in the name of the assignor, not specifically assigned, must be served on the assignor, though the amount assigned exceeds the fund in court (*Briant* v. *Dennett*, 4 Drew. 550). *Secus*, if there has been an *absolute* assignment of the precise fund (*ibid.*), and see as to serving former trustees with a petition for payment out of a fund, *Donelan* v. *Johnson*, 2 W. N. (1867), 238.

COSTS ON PETITIONS. Whether allowed to respondents *served*, and appearing. (1) In *cause*. (2) In *matter*.

Whether a party *served*, but *having no interest*, or having an interest, but *not entitled to appear* (*e. g.*, a receiver, *Herman* v. *Dunbar*, 23 Beav. 312), if he appears, will be allowed his costs of appearance, seems to depend on circumstances. (1) If the petition be presented *in a cause*, they will, as a general rule, be *disallowed* (*Garey* v. *Whittingham*, T. & R. 405; *Day* v. *Croft*, 19 Beav. 518 ; Seton, 94 ; Morgan & Davey, 44 ; but see the older cases, cited *ibid.* p. 43. (2) A distinction, however, has been taken in cases where the petition is presented *in a matter*, and the party served has to consult a solicitor in order to see whether it is necessary for him to appear or not (*Ex parte Queen's College*, 8 W. R. 9 ; *Re Stevens*, 2 Ph. 772; *Re Third Burnt Tree Building Society*, 12 Jur. 595 ; but see *Re Birch's Legacy*, 2 K. & J. 369 ; *Re Justices of Coventry*, 19 Beav. 158). It is not unusual, where it is considered doubtful whether a party ought to be served or not, to serve him with a copy of the petition, and at the same time give notice, that if the party served appears, the payment of his costs will be resisted (see *Roberts* v. *Ball*, 24 L. J. Ch. 471). But this practice has been disapproved of by several of the judges, and in *Rowley* v. *Adams*, 16 Beav. 312, the costs of a respondent who appeared notwithstanding such a notice were allowed. Where, however, a person makes a groundless claim on the strength of which he is served, but which he afterwards withdraws, his costs of appearance will not be allowed (*Re Parry*, 12 Jur. 615 ; *Re Shrewsbury School*, 1 M. & G. 85). But costs may be given to a person who (being entitled in any case, to appear), unsuccessfully opposes the petition (*Ex parte Stevens*, 2 Ph. 772).

Costs not allowed to respondents *not* served.

Where, however, a party, even though he be a trustee, appears on a petition *without being served*, he will not be allowed his costs (*Bennett* v. *Biddles*, 20 Jur. 534 ; *Ex parte Christ Church*, 9 W. R. 474 ; see, however, in the case of a motion, *Shaw* v. *Forest*, 20 Beav. 249, cited *ante*, p. 531).

See further as to service where the petition is for payment of monies out of court, note (*r*) on the 2nd sect. of the Trustee Relief Act, p. 73, *ante;* note (*g*) to the 80th sect. of the Lands Clauses Act, p. 51, *ante ;* and as to service on *infant* respondents, note (*h*) p. 109, *ante*, and on lunatics, note (*a*), p. 104, *ante*, and note (*q*) to sect. 3 of the Trustee Relief Act, p. 81, *ante*, and *Re Wylde*, 5 D. M. G. 25.

As to time of service, see Ord. XXXVII. 2, p. 566, *post*.

As to the mode of serving the order made on a petition, see Ord. XXIII. 10, p. 489, *ante*, and as to enforcing the order, see Ord. XXIX. 1, *ante*.

Foot note.

(*b*) When the foot note stated that it was intended to serve persons, when it became in fact unnecessary to serve, V.-C. Kindersley allowed the order on the petition to be drawn up without service on those persons (*Davies* v. *Combermere*, 1st May, 1860, and see *Re Green's Trusts*, 8 W. R. 403.

In another case V.-C. Stuart allowed the petition to be amended by striking out the note of intended service altogether (*Re Tweedy*, 9 W. R. 398).

Rule 2. Time for service.

2. Unless the Court gives special leave to the contrary, there must be at least two clear days between the service of a petition and the day appointed for hearing the petition; and in the computation of such two clear days, Sundays and other days on which the offices are closed,

except Monday and Tuesday in Easter week, shall not be reckoned (8th May, 1845; Ord. 16, Art. 47).

ORDER XXXIV. Petitions.

*3. In the case of petitions under Acts of Parliament authorising the sale of property for public purposes, where the purchase-money is directed by any such Acts of Parliament to be paid into court, the petitioners claiming to be entitled to the moneys so paid in must make an affidavit, not only verifying their title, but also stating that they are not aware of any right in any other person, or of any claim made by any other person, to the sum of £ in the said petition mentioned, or to any part thereof, or if the petitioners are aware of any such right or claim, they must in such affidavit state or refer to and except the same (4th July, 1828; Exchequer. See Seton on Decrees, 2nd Edition, p. 663) (*c*).

Rule *3. Affidavits in case of petitions under Acts of Parliament authorising sale for public purposes where money is directed to be paid into court.

(*c*) See note (*h*), p. 37, and notes p. 366, *ante*, as to payment out of court.

The affidavit must be made though income only is proposed to be dealt with, *Ex parte Warden of Winchester College*, 14 W. R. 788; *Re Milne*, 8 L. T. N. S. 199, overruling *Ex parte Baroness of Braye*, 9 Hare, App. vii. An affidavit by one of several petitioners is sufficient, *Re Vale of Neath Railway Act*, 14 L. T. N. S. 13, and the tenant for life being infirm, and the remaindermen being infants, the order for payment of dividends to the tenant for life was made on the affidavit of the executors, *Re Smith's Leaseholds*, 14 W. R. 949. See, however, Seton, 1077.

Affidavit of no incumbrances.

Where a fund in court arises from a settled estate, and a tenant in tail who has barred the entail applies for payment, an affidavit of no incumbrances must be made, Seton, 525; *Thornhill* v. *Milbank*, 12 W. R. 523; compare the cases as to affidavits of no settlement cited in note (*c*), p. 366.

Of no settlement.

The affidavit and Accountant-General's certificate must be left with the registrar on bespeaking the order (34th Registr. Regul., March, 1860, Appendix, p. lxxxv. *post*).

Documents left on bespeaking order.

And as to what other documents must be left on bespeaking the order, see *ibid.*, Reg. 32.

ORDER XXXV.

Proceedings in Chambers (*a*).

ORDER XXXV. Proceedings in Chambers.

1. The business to be disposed of by the Master of the Rolls and the Vice-Chancellors respectively, while sitting at Chambers, shall, in addition to the matters mentioned or referred to in the Stat. 15 & 16 Vict. c. 80, s. 26, comprise the following matters, that is to say:—

Rule 1. Business to be disposed of in chambers.

(1.) Applications for payment to any person of the dividends or interest of any stocks, funds, or securities standing to the credit of any cause or

Article (1). [Applications for payment out of court.]

ORDER XXXV. Proceedings in Chambers.

matter depending to the separate account of such person (*b*).

Article (2). [Applications under Legacy Duty Act.]

(2.) Applications under the Stat. 36 Geo. 3, c. 52, s. 32, in all cases where the sum paid into the Bank or the stock transferred into the name of the Accountant-General, under such section, does not exceed three hundred pounds cash, or three hundred pounds stock, as the case may be (*c*).

Article (3). [Applications under Trustee Relief Act.]

(3.) Applications under the Stat. 10 & 11 Vict. c. 96, intituled "An Act for better securing Trust Funds, and for the Relief of Trustees," and the Stat. 12 & 13 Vict. c. 74, intituled "An Act for the further Relief of Trustees," in all cases where the trust fund does not exceed three hundred pounds cash, or three hundred pounds stock, as the case may be (*d*).

Article (4). [Applications under Trustee Acts, for sale under decree.]

(4.) Applications under "The Trustee Act, 1850," and the Stat. 15 & 16 Vict. c. 55, intituled "An Act to extend the provisions of 'The Trustee Act, 1850,'" in all cases where any decree or order shall have been made by the Court for the sale or conveyance of any lands, manors, messuages, tenements, or hereditaments, corporeal or incorporeal, of any tenure or description, whatever may be the estate or interest therein (*e*).

Article (5). [Applications on behalf of infants under Property Law Amendment Act.]

(5.) Applications on behalf of infants under the Stat. 1 Wm. 4, c. 65, ss. 12, 16, & 17, in all cases where the infant is a ward of the Court, or the administration of the estate of the infant or the maintenance of the infant is under the direction of the Court (12th Nov. 1856) (*f*).

Petition unnecessary.

(*a*) These orders were made under 18 & 19 Vict. c. 134, s. 16; see *ante*, p. 235. So that the doubt whether orders could be made in chambers, under the Trustee Relief Act, without petition, expressed in *Re Rye*, 3 W. R. 198, is removed, see p. 146, head (B), *ante*; and a person applying by petition under the Trustee Relief Act, for a sum under 300*l*. (see Art. 3 in text), had to pay the extra costs incurred, *Clark* v. *Ward*, 14 W. R. 241.

Application in chambers.

For an account generally of the business to be transacted in Judges' chambers, see note (*e*) to the 26th sect. of the Master in Chancery Abolition Act (*ante*, p. 146—8).

Principal sums not paid out on summons.

(*b*) The clause does not apply to the payment out of *principal* sums, *Joad* v. *Ripley*, 3 Jur. N. S. 432, and notes thereto; but yet, where a petition was

presented by one of three children for payment out of court of 379*l.*, her share of a fund in court, leave was given to apply in chambers for the shares of the other children, *Winkworth* v. *Winkworth*, 32 Beav. 233, and see *Re the Dunraven Estates*, cited under the Lands Clauses Act, note (*i*), p. 38, *ante*.

Nor sums over 300*l.*

Arrears of interest *exceeding* 300*l.* can still only be paid out on petition (see p. 540, *ante*), *Joad* v. *Ripley*, 3 Jur. N. S. 432; *Daniell* v. *Daniell*, 28 L. T. 80; but see note (*p*), p. 72, *ante*.

(*c*) See the Legacy Duties Act, *ante*, pp. 65, 66.

(*d*) As to payment out under the Trustee Relief Act, see *ante*, p. 72.

(*e*) As to vesting orders under the Trustee Acts, see note (*y*), p. 83, *ante*.

Leases on behalf of infants.

(*f*) As to orders under 1 Will. 4, c. 65, ss. 12, 17, to renew or grant leases on behalf of infants, see note (*a*) to the Settled Estates Act, *ante*, p. 236.

Rule 2. Form of summons by judge.

2. The general summons for the purpose of proceedings before the Master of the Rolls and the Vice-Chancellors respectively at chambers, whether originating in chambers or not, may be in a form similar to the form set forth in Schedule (K.) No. I. (*g*), with such variations as the circumstances of the case may require (16th Oct. 1852; Ord. 1).

(*g*) See Appendix, p. xxi. *post*.

Rule 3. Form of administration summons.

3. The administration summons, under the Stat. 15 & 16 Vict. c. 86, ss. 45 and 47, may be in a form similar to the form set forth in Schedule (K.) No. II., with such variations as the circumstances of the case may require (7th Aug. 1852; 1st Set, Ord. 42) (*h*).

(*h*) See *ante*, pp. 202—205, and Appendix, p. xxii. *post*.

Rule 4. Form of summons by chief clerk.

4. The summons by the chief clerk under the Stat. 15 & 16 Vict. c. 80, s. 30, may be in a form similar to the form set forth in Schedule (K.) No. III. (*i*), with such variations as the circumstances of the case may require (16th Oct. 1852; Ord. 2).

(*i*) See *ante*, p. 151, and Appendix, p. xxiii. *post*.

Rule 5. Preparing, sealing, &c., of summons.

5. Summonses shall be prepared by the parties, and sealed (*k*) by one of the clerks, at the chambers of the judge from whose chambers they are issued, with a seal provided for those chambers; and a copy of such summons shall be left at the judge's chambers by the party obtaining such summons (16th Oct. 1852; Ord. 3).

(*k*) A summons after it has been sealed cannot be altered except on application at chambers, 1st Regul. as to business, Aug. 1857, Appendix, p. liii. *post*.

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Rule 6. Filing duplicate of summons, and stamping copy served in case of applications originating in chambers.

6. In cases of applications under the Stat. 15 & 16 Vict. c. 86, ss. 45 and 47, applications originating in chambers for guardianship and maintenance of infants, and all other applications originating in chambers, a duplicate of the summons shall be filed in the Record and Writ Clerks' Office; and in cases where service is required, the copies served shall be stamped in the manner provided by the Stat. 15 & 16 Vict. c. 86, s. 46 (16th Oct. 1852; Ord. 4.) (*l*).

(*l*) See p. 204, *ante*.

Rule 7. Summons to be served seven days before return thereof.

7. Where proceedings originate in chambers, the original summons shall be served seven clear days before the return thereof (*m*). All other summonses, not being summonses referred to in the 4th Rule of this Order, shall be served two clear days before the return thereof (16th Oct. 1852; Ord. 5).

Service of summons.

(*m*) The summons may be *returnable* after the seven days, *Wycherley* v. *Barnard*, Johns. 41, and for form of affidavit of service of summons, see Schedule to Regul. as to business, Aug. 1857, Appendix, p. lvii. *post*.

Rule 8. Appointment of new time when summons not served within time.

8. Where proceedings originate in chambers, and where from any cause the summons may not have been served upon any party seven clear days before the return thereof, an indorsement may be made upon the summons and upon a copy thereof stamped for service, appointing a new time for the parties not before served to attend at the chambers of the judge; and such indorsements shall be sealed at the judge's chambers; and the service of the copy so indorsed and sealed shall have the same force and effect as the service of an original summons; and where any party has been served before such indorsement, the hearing thereof may, upon the return of the summons, be adjourned to the new time so appointed (16th Oct. 1852; Ord. 6).

Rule 9. Appearances on proceedings in chambers.

9. Where proceedings originate in chambers, the parties served shall, before they are heard in chambers, enter appearances in the Record and Writ Clerks' Office, and give notice thereof (16th Oct. 1852; Ord. 7).

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Rule 10. Proceeding ex parte in case of party summoned making default.

10. Where any of the parties summoned to attend the judge in chambers fail so to attend, whether upon the return of the summons or at any time appointed for the consideration or further consideration of the matter, the judge may proceed *ex parte*, if, considering the nature of the case, he think it expedient so to do (3rd April, 1828; Ord. 53. 3rd June, 1850; Ord. 6).

Rule *11. Reconsideration of ex parte proceedings.

*11. Where the judge has proceeded *ex parte*, such proceeding shall not in any manner be reconsidered in the judge's chambers, unless the judge, upon a special application made to him for that purpose by a party who was absent, shall be satisfied that he was not guilty of wilful delay or negligence. And in such case, the costs occasioned by his non-attendance shall be in the discretion of the judge, who may fix the same at the time, and direct them to be paid by the party or his solicitor before he shall be permitted to have such proceeding reconsidered, or make such other order as to such costs as to such judge may seem meet (3rd April, 1828; Ord. 54) (*n*).

Costs.

(*n*) The latter part of this rule, providing that the costs shall be in the discretion of the judge, is new.

Rule 12. Claimants not coming in to prove, &c., excluded.

12. Where a decree or order is made, whether in court or in chambers, directing an account of debts, claims, or liabilities, or an inquiry for heirs, next of kin, or other unascertained persons, unless otherwise ordered, all persons who do not come in and prove their claims within the time which may be fixed for that purpose by advertisement (*o*), shall be excluded (*p*) from the benefit of the decree or order (16th Oct. 1852; Ord. 9).

(*o*) See form of advertisement, Sched. L. Appendix, p. xxiii. *post*.

(*p*) As to claimants coming in after the time fixed by the advertisements, on application made by summons, see r. 43, p. 558, *post*, rule 10, p. 639, *post*.

Claimants coming in after time fixed by advertisement.

After apportionment, new claimants may come in during the prosecution of the decree (see sect. 19, and note (*v*), p. 550, *post*), and even *after distribution*.

After distribution under a decree persons making further claims may proceed *by bill* against those persons who have received the assets, but not against the executors, who are indemnified by the decree, see *Clegg* v. *Rowland*, cited note (*o*), p. 282, *ante*; *David* v. *Frowd*, 1 M. & K. 209; *Good* v. *Blewitt*, 19 Ves. 339; *Greig* v. *Somerville*, 1 R. & M. 338; *Thomas* v. *Griffiths*, 2 Gif. 504; 2 D. F. J.

Rule 13.

13. Where a decree or order is made, whether in court or in chambers, directing any property to be sold, unless

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otherwise ordered, the same shall be sold with the approbation of the judge to whose court the cause or matter is attached, to the best purchaser that can be got for the same, to be allowed by the judge, and all proper parties shall join in the sale and conveyance as the judge shall direct (16th Oct. 1852; Ord. 12) (*q*).

Sale under decree or order.

Questions as to sale considered in chambers.

(*q*) By the orders of the 16th July, 1851, the Masters were enabled to fix *reserved biddings* upon a sale under their direction, to direct *deposits* to be made, and to appoint persons to receive the same, and also to receive *proposals, for private contract*, and under the 61st rule of this order, their powers are vested in the judges in chambers. See, too, Prel. Ord. r. 5, p. 363, *ante*, and note (*f*), p. 147, *ante*, as to questions entertained in chambers, and see 13, 14, 15 Regul. as to business, August, 1857, Appendix, p. lv. *post*, as to the affidavits and documents necessary to be produced in chambers, &c.

Conduct of sale generally.

The conduct of the sale is ordinarily entrusted to the plaintiff (*Knott* v. *Cottee* (No. 4), 27 Beav. 33), even though he would not have been entitled thereto according to the contract if performed without suit (*Dale* v. *Hamilton*, 10 Hare, App. vii.). When, however, it appears to be for the benefit of all parties it may be given to a defendant (*Knott* v. *Cottee*, *ante*). When a sale is directed, every party to the suit having the title deeds is bound to facilitate the sale (*ibid.*). On a sale under the 15 & 16 Vict. c. 86, s. 48, *ante*, p. 205, the conduct of the sale is given to the first mortgagee (*Hewitt* v. *Nanson*, cited in note (*v*), p. 206, *ante*).

Under 15 & 16 Vict. c. 86, s. 48.

Effect of taking possession or paying purchase-money into court upon objections for title.

A purchaser under a decree cannot generally take possession (*Hutton* v. *Mansell*, 2 Beav. 260), or pay his money into court, *Denning* v. *Henderson*, 1 De G. & Sm. 689, without accepting the title; but see *Dempsey* v. *Dempsey*, 1 De G. & Sm. 691; Seton, 1195. And an application to pay the money into court, and to be let into possession without prejudice to objections to the title, will be refused (*Rutter* v. *Marriott*, 10 Beav. 33; but see *Marfell* v. *Rudge*, 2 Y. & Coll. Exch. R. 566).

Relieving purchaser from purchase.

A purchaser under a decree of the Court will not be relieved from his purchase merely because there are irregularities in the decree (*Baker* v. *Sowter*, 10 Beav. 343). *Secus* if there is a want of jurisdiction or parties (*ibid.*; and see, as to equitable interests being bound by the decree, *Re Williams*, 5 De G. & Sm. 515). A purchaser under a decree is entitled to his costs when the title is bad (*Smith* v. *Nelson*, 2 S. & S. 557).

Costs where title bad.

Opening biddings, and

The practice of opening biddings on sales under the Court, except in cases of fraud, is abolished by the 30 & 31 Vict. c. 48, quoted p. 156, *ante*; as to *reserving* biddings, 13 & 14 Judges' Regul. p. lv., *post*; and as to sales before decree, *ante*, p. 219; and as to abstracts, conveyances, &c., on sales by the Court, *ante*, p. 158.

conditions of sale.

As to the form of conditions for sale, see Appendix, p. lxiv. *post*; and for the mode of certifying the result of the sale, see 15th Judges' Regul. Appendix, p. lv. *post*.

Rule 14. Attendances on further consideration.

14. Where matters in respect of which summonses have been issued, are not disposed of upon the return of the summons, the parties shall attend from time to time without further summons, at such time or times as may be appointed for the consideration or further consideration of the matter (16th Oct. 1852; Ord. 16) (*r*).

Adjournments in chambers.

(*r*) As to adjournments of causes in chambers, and the mode of bringing them on after such adjournment, see 18th Regul. as to business, Aug. 1857, Appendix, p. lv. *post*, and note (*k*), p. 149, *ante*.

This section applies only where a regular adjournment has been made, and where a witness had been summoned for examination, but, having received notice that the examination would not be proceeded with, did not attend, and no adjournment was thereon made, it was held that he could not be forced to attend again without a fresh summons being tken out, *Lawson* v. *Stoddart*, 12 W. R. 286.

Rule 15. Copy of decree or order to be left at judge's chambers.

15. In all cases of proceedings in chambers under any decree or order, the party prosecuting the same shall leave a copy of such decree or order at the judge's chambers, and shall satisfy the same to be a true copy of the decree or order as passed and entered (16th Oct. 1852; Ord. 17) (*s*).

(*s*) A note stating the names of the solicitors for all parties, and for whom they are concerned, must also be left, and when the suit has been instituted by bill, a printed copy of the bill must be left at the same time (5th and 6th Regul. as to business, Aug. 1857, Appendix, p. liii. *post*). Documents to be left at chambers.

Rule 16. Summons to proceed with accounts or inquiries directed. Directions. Evidence.

16. Upon a copy of the decree or order being left, a summons shall be issued to proceed with the accounts or inquiries directed (*t*); and upon the return of such summons, the judge, if satisfied by proper evidence that all necessary parties have been served with notice of the decree or order, shall thereupon give directions as to the manner in which each of the accounts and inquiries is to be prosecuted, the evidence to be adduced in support thereof, the parties who are to attend on the several accounts and inquiries, and the time within which each proceeding is to be taken; and a day or days may be appointed for the further attendance of the parties, and all such directions may afterwards be varied or added to as may be found necessary (16th Oct. 1852; Ord. 18).

(*t*) See sect. 54 of the Chancery Improvement Act, 1852, p. 218, *ante*, and notes thereto, as to special directions for taking accounts and as to the ordinary directions, see Ord. XXIII. 14—16, *ante*, p. 491, and see form of ordering accounts and inquiries, Appendix, p. v. *post*. Directions as to taking accounts.

Rule 17. Settling deed under decree, &c., in case parties differ.

17. Where, by any decree or order, a deed is directed to be settled by the judge in chambers (*u*), in case the parties differ about the same, a summons to proceed shall be issued; and upon the return of such summons the party entitled to prepare such deed shall be directed to deliver a copy thereof, within such time as the judge shall think fit, to the party entitled to object thereto; and the

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party so entitled to object shall be directed to deliver to the other party a statement in writing of his objections (if any) within eight days after the delivery of such copy; and the proceeding shall be adjourned until after the expiration of the said period of eight days (see 76th Ord. of 23rd Nov. 1831).

(*u*) For form of such decree, see Seton, 1192, and as to settling deeds in chambers, see *ante*, p. 158.

Deeds relating to infants.

Where an infant is interested, the words "in case the parties differ," are omitted, *Calvert* v. *Godfrey*, 2 Beav. 267.

Rule 18. Service of notice of decree or order where dispensed with.

18. Where, upon the hearing of the summons to proceed, it appears to the judge that by reason of absence, or for any other sufficient cause, the service of notice of the decree or order upon any party cannot be made or ought to be dispensed with, the judge may, if he shall think fit, wholly dispense with such service, or may, at his discretion, order any substituted service, or notice by advertisement or otherwise, in lieu of such service (16th Oct. 1852; Ord. 19).

Rule 19. Further accounts or inquiries.

19. Where, in the prosecution of the decree or order, it appears to the judge that it would be expedient that further accounts should be taken or further inquiries made, he may order the same to be taken or made accordingly, or, if desired by any party, may direct the same to be considered in open court (*v*) (16th Oct. 1852; Ord. 20).

Consideration in open court.

Where new evidence is tendered.

(*v*) When evidence is tendered in support of a question not raised by the bill, there must be an order directing an inquiry, and the case cannot proceed upon a simple adjournment to chambers (*Kelson* v. *Kelson*, 9 Hare, App. lxxxviii., and see note (*z*), to sect. 27, *post*, and note (*h*), p. 149, *ante*, but see *Delevante* v. *Child*, 6 Jur. N. S. 118, and *Mutter* v. *Hudson*, 2 Jur. N. S. 34, where it was said that the inquiries need not be founded upon formal evidence adduced by the party desiring the inquiry; *sed quære*.

Inquiries must be consistent with decree.

This rule does not empower the judge in chambers to direct accounts on a footing inconsistent with the decree itself (*Partington* v. *Reynolds*, 4 Drew. 253; *Nelson* v. *Booth*, 3 De G. & J. 119; and see the cases on supplemental bills in the nature of bills of review, p. 507, *ante*.

Orders in pursuance of decree may be varied.

Orders made in prosecution of a decree may be varied under this section. *E. g.*, after a fund has been apportioned, a new claimant may come in; *Gillespie* v. *Alexander*, 3 Russ. 130; *Lashley* v. *Hogg*, 11 Ves. 602; *Montefiore* v. *Brown*, 7 H. L. Ca. 241; but *not* after the whole *decree* has been *enrolled*, *Knierim* v. *Schmauss*, 10 W. R. 860; see note (*p*), p. 547, *ante*. So, too, an order directing the payment of costs out of a fund in court, may be set right by making another fund primarily liable, *Sheppard* v. *Sheppard*, 33 Beav. 129.

As to adjournment into court generally, see note (*i*), p. 149, *ante*. Where one of two executors died before probate, but after doing acts which showed that he had accepted the office of executor, a question which had arisen as to whether he was, under such circumstances, indebted to the estate, was held to be rightly adjourned into court under this rule (*Clark* v. *Phillips*, 2 W. R. 331).

Adjournment into court.

Rule 20. Judge may nominate one solicitor for a class.

20. Where, upon the hearing of the summons to proceed, or at any time during the prosecution of the decree or order, it appears to the judge, with respect to the whole or any portion of the proceedings, that the interests of the parties can be classified, he may require the parties constituting each or any class to be represented by the same solicitor; and where the parties constituting such class cannot agree upon the solicitor to represent them, the judge may nominate such solicitor for the purpose of the proceedings before him; and where any one of the parties constituting such class declines to authorise the solicitor so nominated to act for him, and insists upon being represented by a different solicitor, such party shall personally pay the costs of his own solicitor of and relating to the proceedings before the judge, with respect to which such nomination shall have been made, and all such further costs as shall be occasioned to any of the parties by his being represented by a different solicitor from the solicitor so to be nominated (3rd June, 1850; Ord. 2) (*w*).

One set of costs where persons in same interest appear separately, *except* where plaintiff and defendant employ same solicitor.

(*w*) Where a number of persons *in the same interest* having liberty to attend the proceedings in an administration suit appeared separately on an adjourned summons, only one set of costs was allowed, *Stevenson* v. *Abington*, 11 W. R. 936.

Where the plaintiff and defendant in an administration suit employed the same solicitor, other residuary legatees having liberty to attend the proceedings in chambers, were also allowed one set of costs between them, *Daubney* v. *Leake*, 1 L. R. Eq. 495; this principle is applied when the cause comes on for further consideration, *ibid.*; and see *Hubbard* v. *Leatham*, 15 W. R. 553.

Rule applies on further consideration.

It is difficult to lay down any precise rule as to the circumstances under which parties are held to be in the same interest, so as to be allowed only one set of costs.

Parties not in same interest may appear separately.

Where one of a class of defendants is separately charged, and relief is prayed against him, he may appear separately and have his costs, *Shaw* v. *Johnson*, 9 W. R. 629; and see *Re Humber Ironworks Company*, 2 L. R. Eq. 15; where the costs payable on winding-up petitions are considered, *Re European Banking Company*, *ibid.* 521.

Winding-up petitions.

Trustees ought not generally to sever in their defence, *Gaunt* v. *Taylor*, 2 Beav. 346; see *Course* v. *Humphrey*, 26 Beav. 402; *Attorney-General* v. *Wyvill*, 28 Beav. 464; where only one set of costs was allowed, the division being left to the taxing-master. In *Prince* v. *Hine* (No. 2), 27 Beav. 345; where only one set of costs was allowed, one of the trustees, who had alone

Trustees severing in defence.

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obeyed an order for payment of money into court, by paying in the whole sum ordered to be paid in, was held entitled to the whole of the costs.

Severing in defence.

In general trustees and their *cestuis que trusts*, are not justified in severing, *Farr* v. *Sheriffe*, 4 Hare, 528; and so with mortgagor and mortgagee, *Remnant* v. *Hood*, 27 Beav. 613.

Trustee; husband and wife; parties living at a distance, may sever.

A husband and wife living apart were held entitled only to one set of costs, *Garey* v. *Whittingham*, 5 Beav. 268.

Where defendants live at a distance, this may be a sufficient ground for putting in several answers, *Aldridge* v. *Westbrook*, 4 Beav. 212; *Wiles* v. *Cooper*, 9 Beav. 299; *Russell* v. *Nicholls*, 9 Jur. 613; but see *Farr* v. *Sheriffe*, l. c.

Charities in the same interest appearing on an appeal by several counsel were disallowed the costs, *Foxen* v. *Foxen*, 13 W. R. 33.

See as to the costs where the *same solicitor* appears for *parties in different interests*, Ord. xl. 12, p. 583, *post*, and see next rule.

Rule 21. Judge may require distinct solicitor to represent parties.

21. Whenever, in any proceeding before a judge in chambers, the same solicitor is employed for two or more parties, such judge may at his discretion require that any of the said parties shall be represented before him by a distinct solicitor, and adjourn such proceedings until such party is so represented (3rd April, 1828; Ord. 77).

Rule 22. Time for bringing in decree or order directing accounts or inquiries. Consequences of default.

22. Every decree or order directing accounts or inquiries to be taken or made shall be brought into the judge's chambers by the party entitled to prosecute the same, within ten days after the same shall have been passed and entered; and in default thereof, any other party to the cause or matter shall be at liberty to bring in the same, and such party shall have the prosecution of such decree or order, unless the judge shall otherwise direct (3rd June, 1850; Ord. 1).

Rule *23. Consequences of default of receiver, or delay in prosecuting proceedings in chambers.

*23. In case of default by any receiver appointed by the Court in leaving or passing any account, or in making any payment, or in case any other proceeding pending at a judge's chambers is not prosecuted with due diligence, the parties, or any of them, may be required to attend at chambers at a time to be appointed for that purpose, to show cause why such account has not been left or passed, payment made, or other proceeding prosecuted; and thereupon such directions may be given at chambers or by adjournment in open court as shall be proper to ensure the prosecution thereof by some person interested therein, and for the discharge of any receiver, and appointment of another, and for payment of the costs incurred by any

neglect or default; or a certificate by the chief clerk of such neglect or default as aforesaid, or of any abandonment or abatement of the proceedings or otherwise, according to the facts, may be made and filed, without any fee being payable thereon; and after such certificate shall have been so made, unless the same shall be discharged, none of the parties shall be at liberty to further prosecute the proceeding at chambers, unless and until the Court or judge shall upon application make an order directing the same to be prosecuted; and upon such certificate becoming binding, any party may apply to the Court, and the Court may make such order relative to costs, and to relieve any party from the effect of any decree or order before made or proceeding taken which shall not have been duly prosecuted, or otherwise, as may be thought proper. And for the purposes aforesaid, any party, or the solicitor of the suitors' fund, may be directed to summon the persons whose attendance is required, and to conduct any proceedings, and carry out any directions which may be given; and the costs of the solicitor of the suitors' fund shall be paid by such parties or out of such funds as the Court or judge may direct; and if any costs of the solicitor of the suitors' fund be not otherwise paid, the same shall be paid out of the suitors' fund (see Ord. 56 of 3rd April, 1828. And see 2nd Rule of Ord. XXIV., *supra*) (*x*).

(*x*) This rule is substantially new. The 56th Order of April, 1828, provided that "where the party actually prosecuting a decree or order does not proceed before the Master with due diligence, the Master shall be at liberty, upon the application of any other party interested, either as a party to the suit or as one who has come in and established his claim before the Master to commit to him the prosecution of the said decree or order; and from thenceforth, neither the party making default, nor his solicitor, shall be at liberty to attend the Master as the prosecutor of such decree or order."

Party not prosecuting decree with due diligence.

Where a plaintiff obtained a decree giving him the right to prosecute inquiries in chambers, and produced no evidence to enable the Master to prosecute the inquiry for three years, on a certificate by the Master to that effect, an application by the plaintiff that he might be permitted to prosecute the inquiry was refused with costs, *James* v. *Gwynne*, 2 Jur. N. S. 436; and where a plaintiff neglected to prosecute the suit for a year, he had to pay the costs of the Master's report, *Ridley* v. *Tiplady*, 20 Beav. 44; see *Parkinson* v. *Lucas*, 28 Beav. 627, in which case a reference under the old practice to the Master had not been prosecuted for ten years, and the Court transferred the reference to chambers, to be there disposed of at once, and intimated that if this was not done, it would be disposed of summarily.

For three years.

For a year.

For ten years.

When the plaintiff in the first of several suits has been guilty of negligence

Transferring conduct of suit.

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in prosecuting certain orders, the Court will give the conduct of such orders to the plaintiff in one of the other suits, though it will not take from the plaintiff in the first suits the conduct of the causes generally (*Vanderwell* v. *Vanderwell*, 1 L. T. N. S. 266; and see, as to determining questions relating to the conduct of suits generally, note (*f*), p. 147, *ante*).

Powers of party to whom carriage of suit is transferred.

The party to whom the carriage of the suit is transferred may inspect briefs, documents, &c., in the possession of the original plaintiff necessary to the carrying out of the suit (*Bennett* v. *Baxter*, 10 Sim. 417; and see further, *Smith* v. *Guy*, 2 C. P. C. 298, and *ante*, p. 350).

As to carrying on a creditors' suit after the death of the plaintiff, see *Dixon* v. *Wyatt*, 4 Madd. 392, and pp. 211—2, *ante*.

Rule 24. Summons and Appointment Book.

24. At the time any summons or appointment is obtained, an entry thereof shall be made in "The Summons and Appointment Book," stating the date on which the summons is issued or the appointment made, the name of the cause or matter, and by what party, and, shortly, for what purpose such summons or appointment is obtained, and at what time such summons is returnable, and for what time such appointment is made (16th Oct. 1852; Ord. 21).

Rule 25. Lists and order of hearing of matters at chambers.

25. List of matters appointed for each day shall be made out and affixed outside the doors of the chambers of the respective judges. And, subject to any special direction, such matters shall be heard in the order in which they appear in such lists (16th Oct. 1852; Ord. 22).

Rule 26. Course of proceeding.

26. The course of proceeding in chambers shall ordinarily be the same as the course of proceeding in court upon motions. No states of facts, charges, or discharges, shall be brought in. But when directed, copies, abstracts, or extracts of or from accounts, deeds, or other documents, and pedigrees and concise statements, shall be supplied for the use of the judge and his chief clerks, and, where so directed, copies shall be handed over to the other parties. But no copies shall be made of deeds or documents where the originals can be brought in, unless the judge shall otherwise direct (*y*) (16th Oct. 1852; Ord. 23).

Documents.

Copies.

(*y*) For mode of writing copies, &c., see 17 Judges' Regul., Appendix, p. lv. *post*.

Rule 27. Notice of intention to use affidavit

27. The party intending to use any affidavit on any proceeding in chambers shall give notice to the other parties concerned of his intention in that behalf (16th Oct. 1852; Ord. 24) (*z*).

(*z*) Affidavits as to matters not *directly* in issue in the cause may be admitted in chambers, see 13 & 14 Vict. c. 35, s. 28 (p. 130), but evidence discovered after the original hearing, raising a new issue and a new defence, cannot be admitted upon the hearing upon further directions, but if justice cannot otherwise be done, the Court will direct an inquiry, *Howard* v. *Chaffers*, 11 W. R. 585; and see note (*v*) to rule 19, *ante*.

An undertaking not to use an affidavit at the hearing does not preclude its being used in an inquiry in chambers, *Jenner* v. *Morris*, 10 W. R. 640.

Affidavits used in chambers are open to cross-examination, see note (*u*), p. 193, *ante*.

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Affidavits in chambers as to new issues.

28. All affidavits which have been previously made and read in court, upon any proceeding in a cause or matter, may be used before the judge in chambers (3rd April, 1828; Ord. 65).

Rule 28. Affidavits used in court may be used in chambers.

29. Where a *subpœna* is required for the attendance of a witness for the purpose of proceedings in chambers, such *subpœna* shall be issued from the Record and Writ Clerks' Office upon a note from the judge (3rd April, 1828; Ord. 69) (*a*).

Rule 29. Subpœna for attendance of witness in chambers.

(*a*) See form of subpœna, Appendix, p. vii., and note (*m*), p. 152, *ante*.

Subpœna.

30. Where a chief clerk is directed by the judge to examine any witness, the practice and mode of proceeding shall be the same as in the case of the examination of witnesses before an examiner, subject to any special directions which may be given in any particular case (16th Oct. 1852; Ord. 26) (*b*).

Rule 30. Practice on examination by the chief clerk. Winding-up cases.

(*b*) See 15 & 16 Vict. c. 80, s. 30, p. 151, *ante*.

31. The original examinations and depositions of parties and witnesses taken by or before the chief clerk, authenticated by his signature, shall be transmitted by him to the Record and Writ Clerks' Office, to be there filed; and any party to the suit or proceeding may have a copy thereof, or of any part or portion thereof, upon payment of the proper fee (16th Oct. 1852; Ord. 27).

Rule 31. Filing of depositions before chief clerk.

32. All orders made in chambers, and drawn up by the chief clerk or registrar, shall be entered in the same manner and in the same office as orders made in open court are entered (16th Oct. 1852; Ord. 28) (*c*).

Rule 32. Orders made in chambers how entered.

(*c*) Care should be taken that no discrepancy exists between the summons and the order (*Rippin* v. *Dolman*, 2 W. R. 432).

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Rule 33. Accounts to be verified by affidavit numbered and left in chambers.

33. Where any account is directed to be taken, the accounting party, unless the judge shall otherwise direct, shall make out his account and verify the same by affidavit (*d*). The items on each side of the account shall be numbered consecutively, and the account shall be referred to by the affidavit as an exhibit, and be left in the judge's Chambers (16th Oct. 1852; Ord. 29).

(*d*) The party making such affidavit is liable to cross-examination, see note (*m*), p. 152, and note (*u*), p. 193, *ante*, and see next note.

Rule 34. Surcharge.

34. Any party seeking to charge any accounting party beyond what he has by his account admitted to have received, shall give notice thereof to the accounting party, stating, so far as he his able, the amount sought to be charged, and the particulars thereof, in a short and succinct manner (16th Oct. 1852; Ord. 30) (*e*).

Cross-examination of accounting party.

(*e*) Therefore an accounting defendant who files an affidavit verifying his account, if he is cross-examined on such affidavit, is entitled to notice of the points on which he is to be cross-examined, *Re Lord*, 2 L. R. Eq. 605; *Wormsley* v. *Sturt*, 22 Beav. 398 (see note (*m*) p. 152, *ante*).

Rule 35. Advertisements.

35. Where an advertisement is required for the purpose of any proceeding in chambers, a peremptory and only one shall be issued, unless for any special reason it may be thought necessary to issue a second advertisement or further advertisements; and any advertisement may be repeated as many times and in such papers as may be directed (16th Oct. 1852; Ord. 33).

Rule 36. By whom prepared.

36. The advertisement shall be prepared by the party prosecuting the decree or order, and submitted to the chief clerk for approval, and, when approved, shall be signed by him, and such signature shall be sufficient authority to the printer of the Gazette to insert the same (16th Oct. 1852; Ord. 34).

Signature of chief clerk thereto.

Rule 37. Day for hearing claimants.

37. Advertisements for *creditors or other claimants* (*f*) shall fix a time for the creditors or claimants to come in and prove their claims, and shall appoint a day for the hearing and adjudicating thereon, and may be in a form similar to the form set forth in the Schedule (L.) (*g*), with such variations as the circumstances of the case may require (16th Oct. 1852; Ord. 35).

Form of advertisement.

(*f*) This rule, and the 38th, 41st, 42nd, and 43rd, are abrogated, so far as relates to creditors, by Order of 27 May, 1865, p. 637, *post*, which provides that creditors' claims may be ordered to be sent in to the *executor of the deceased* or other person, who may admit them without requiring further attendance or proof from the creditor.

Order May 27, 1865, as to *creditors.*

(*g*) See form of advertisement in Appendix, p. xxiii. *post.*

Rule 38. Claim Book. Notice of entering claims and affidavit.

38. *Claimants* (*h*) coming in pursuant to advertisement shall enter their claims at the chambers of the judge in the "Claims Book," for the day appointed for hearing by the advertisement, and shall give notice thereof and of the affidavit filed to the solicitors in the cause, within the time specified in the advertisement for bringing in claims (16th Oct. 1852; Ord. 36).

(*h*) See note (*f*), *supra*, as to creditors.

The number of the entry of the claim must be stated in the notice, 9th Regul. as to business, Aug. 1857, Appendix, p. liv. *post.*

Rule 39. Office copies of affidavits.

39. The claimants filing affidavits (*i*) shall not be required to take office copies; but the party prosecuting the cause or matter shall take office copies, and produce the same at the hearing, unless the judge shall otherwise direct (16th Oct. 1852; Ord. 37).

(*i*) The claimant may be cross-examined on his affidavit, see notes (*d*) and (*e*), *supra.*

Rule 40. Adjournment. Closing further evidence.

40. Where, on the day appointed for hearing the claims, any of them remain undisposed of, an adjournment day for hearing such claims shall be fixed (*k*); and where further evidence is to be adduced, a time may be named within which the evidence on both sides is to be closed; and directions may be given as to the mode in which such evidence is to be adduced (16th Oct. 1852; Ord. 38).

(*k*) See further, as to the adjournment of cases in chambers, note (*r*) to sect. 14, *ante*, and note (*k*) p. 149, *ante.*

Rule 41. Claim entered and affidavit filed four days before adjournment day.

41. Any *claimant* (*l*) who has not before entered his claim may be heard on such adjournment day, provided he has entered his claim and filed his affidavit four clear days prior to such day, and no certificate of debts or claims has been made in the meantime (16th Oct. 1852; Ord. 39).

(*l*) See as to creditors, note (*a*), *ante.*

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[The 42nd rule is abrogated, see note (*f*), *ante*.]

Rule 42.

Rule 43. Claims excluded.

43. After the time fixed by the advertisement, no *claims* (*m*) shall be received (except, as before provided, in case of an adjournment), unless the judge at chambers shall think fit to give special leave, upon application made by summons (*n*), and then upon such terms and conditions as to costs and otherwise as the judge shall think fit (16th Oct. 1852; Ord. 41).

(*m*) See note (*f*), *ante*, as to creditors.
(*n*) See *Halliley* v. *Henderson*, 4 Jur. N. S. 202, and note (*o*) to r. 12, *ante*.

Rule 44. Claims allowed.

44. A list of all claims allowed shall, when required by the judge, be made out and left in the judge's chambers by the party prosecuting the decree or order (16th Oct. 1852; Ord. 42).

Rule 45. Interest and apportionment.

45. Where the Court directs any computation of interest, or the apportionment of any fund, which is to be acted upon by the Accountant-General or other person without any further order from the Court, the decree or order made by the Court may direct such computation or apportionment to be made by one of the chief clerks attached to the court of the judge, and may direct the certificate thereof, signed by such chief clerk, to be acted upon accordingly, without the same being signed and adopted by the judge (16th Oct. 1852; Ord. 43).

Rule 46. Contents of certificate in cases of account.

46. Where an account is directed, the certificate shall state the result of such account, and not set the same out by way of schedule, but shall refer to the account verified by the affidavit filed, and shall specify by the numbers attached to the items in the account, which, if any, of such items have been disallowed or varied, and shall state what additions, if any, have been made by way of surcharge. And where the account verified by the affidavit has been so altered that it is necessary to have a fair transcript of the account as altered, such transcript may be required to be made by the party prosecuting the decree or order, and shall then be referred to by the certificate. The accounts, and the transcripts (if any), referred to by certificates, shall be filed there-

Transcript.

Filing of accounts and transcripts.

with, but no copies thereof shall be required to be taken by any party (16th Oct. 1852; Ord. 44) (*o*).

(*o*) See note (*p*), p. 153, *ante*.

Rule 47. Reference to decree or order, documents, or evidence.

47. The certificates to be made by the chief clerk to the judge shall not, except the special circumstances of the case shall render it necessary, set out the decree or order or any documents or evidence or reasons, but shall refer to the decree or order, documents, and evidence, or particular paragraphs thereof, so that it may appear upon what the result stated in any such certificate is founded (16th Oct. 1852; Ord. 45) (*p*).

(*p*) See note (*p*), p. 153, *ante*.

Rule 48. Form of chief clerk's certificate.

48. The certificate of the chief clerk to the judge may be in a form similar to the form set forth in Schedule (M.), with such variations as the circumstances of the case may require; and, when prepared and settled, it shall be transcribed by the solicitor prosecuting the proceedings, in such form and within such time as the chief clerk shall require, and shall then be signed by the chief clerk at an adjournment to be made for that purpose. But where, from the nature of the case, the certificate can be drawn and copied in chambers whilst the parties are present before the chief clerk, the same shall be then completed and signed by him without any adjournment (16th Oct. 1852; Ord. 46) (*q*).

Transcript.

(*q*) See Appendix, p. xxiv. *post*, and note (*p*), p. 153, *ante*.

Rule 49. Time for taking opinion of judge before certificate signed by him.

49. The time within which any party is to be at liberty to take the opinion of the judge upon any proceeding which shall have been concluded, but as to which the certificate of the chief clerk shall not have been signed and adopted by the judge, shall be four clear days after the certificate shall have been signed by the chief clerk (16th Oct. 1852; Ord. 47) (*r*).

(*r*) See sect. 33 of 15 & 16 Vict. c. 80, *ante*, p. 154, and notes thereto.

Rule 50. Summons for taking opinion of judge.

50. Any party desiring to take the opinion of the judge, as mentioned in the last preceding rule, shall, within four clear days after the certificate shall have been signed

ORDER XXXV. Proceedings in Chambers.

by the chief clerk, obtain a summons for such purpose (16th Oct. 1852; Ord. 48).

Rule 51. Time for signature of certificate by judge.

51. At the expiration of four clear days after the certificate shall have been signed by the chief clerk, if no party has in the meantime obtained a summons to take the opinion of the judge thereon, the chief clerk shall submit the certificate to the judge for his approval, and the judge may thereupon, if he approve the same, sign such certificate in testimony of his adoption thereof, as follows:—"Approved, this day of " (16th Oct. 1852; Ord. 49).

Rule 52. Time for applying to discharge or vary certificate signed.

52. The time within which an application may be made, by summons or motion, to discharge or vary any certificate (*s*) which has been signed and adopted by the judge in chambers, shall be eight *clear* days (*t*) after the filing of such certificate (16th Oct. 1852; Ord. 51).

"Eight days."

(*s*) See 15 & 16 Vict. c. 80, s. 34, p. 154, *ante*.
(*t*) See note (*u*), p. 155, *ante*, as to the computation of these eight days.

Rule 53. Time for signature of certificate to be acted upon by Accountant-General without further order.

53. The 49th, 50th, 51st, and 52nd Rules of this Order shall not apply to certificates which are to be acted upon by the Accountant-General without any further order. Such certificates may be signed and adopted by the judge on the day after the same shall have been signed by the chief clerk, unless any party desiring to take the opinion of the judge thereon obtains a summons for that purpose before twelve o'clock on that day. And the time for applying to discharge or vary such certificates, when signed and adopted by the judge, shall be two clear days after the filing thereof (1st June, 1854; Ord. 4).

Time for applying to discharge or vary same when signed.

Rule 54. Certificates on passing receiver's accounts.

54. The 49th, 50th, 51st, and 52nd Rules of this Order shall not apply to certificates on passing receivers' accounts. Such certificates may be approved and signed by the judge without delay, and, upon being so signed, shall be filed and forthwith acted upon (16th Oct. 1852; Ord. 53).

Rule 55. Filing of certificate and accounts.

55. The certificate when signed by the judge, with the accounts, if any, to be filed therewith, shall be transmitted by the chief clerk to the Report Office, to be there filed (16th Oct. 1852; Ord. 50).

56. Certificates of the chief clerk, made as mentioned in the 45th rule, and not required to be signed and adopted by the judge, shall be transmitted and filed in the same manner as those signed and adopted by the judge (16th Oct. 1852; Ord. 52).

Rule 56. Filing of certificates requiring no signature by judge.

57. A register shall be kept of all proceedings in the judge's chambers, with proper dates, so that all the proceedings in each cause or matter may appear consecutively and in chronological order, with a short statement of the questions or points decided or ruled at every hearing (16th Oct. 1852; Ord. 54).

Rule 57. Register of proceedings in chambers.

58. Any judge of the court whose chambers may be open for business during any vacation may issue summonses for the purpose of any proceeding before any other judge at chambers after the vacation (1st June, 1854; Ord. 2).

Rule 58. Vacations.

59. In the interval between the close of the sittings after any term and the commencement of the sittings before or at the beginning of the next ensuing term, any judge of the court may sign and adopt any certificate made by the chief clerk of any other judge; and decrees or orders made by any judge of the court may be prosecuted at the chambers of any other judge by his permission; and in case the prosecution thereof shall not be completed during such interval, the prosecution may be continued at the chambers of the same judge, if and so far as he shall think fit. In all cases in which any judge signs and adopts a certificate made in pursuance of a decree or order made by any other judge, it shall be expressed that he does so for such other judge; and such certificate shall in all future proceedings be deemed to be signed and adopted by the judge for whom it is signed and adopted, save that no application to discharge or vary such certificate shall be made to the judge for whom the same is signed and adopted, without the consent of the judge by whom it has been signed and adopted; and the judge by whom it has been signed and adopted shall have the same power to discharge or vary the certificate as he would have had if it had been made in

Rule 59. In vacations certificates of chief clerk of another judge may be signed and adopted by any judge, and decree, &c., of one judge prosecuted in chambers of another judge.

ORDER XXXV. Proceedings in Chambers.

pursuance of a decree or order made by himself (26th July, 1853).

Rule 60. Scandal.

60. If any party wishes to complain of any matter introduced into any statement, affidavit, or other proceeding before the judge in chambers, on the ground that it is scandalous, he shall be at liberty to take out a summons for the judge to examine such matter, and the judge may cause any such matter which he shall deem to be scandalous to be expunged (3rd April, 1828; Ord. 73).

Rule 61. Judge in chambers to have powers formerly exercisable by Masters.

61. All other powers and authorities which at the time of the passing of the Stat. 15 & 16 Vict. c. 80, were exerciseable by the Masters in Ordinary of the Court of Chancery, under or by virtue of any general order or orders of the Court, may be exercised by the judge in chambers (16th Oct. 1852; Ord. 58) (*u*).

Power of judge in chambers.

(*u*) For example, the judge has power to receive proposals for sale by private contract, Seton, 1189, see note (*q*), p. 548, *ante*.

Rule 62. Power of Court or judge to enlarge or abridge time and direct course of proceedings not to be affected.

62. The power of the Court and of the judge in chambers to enlarge or abridge the time for doing any act or taking any proceeding, and to give any special direction as to the course of proceeding in any cause or matter, shall not be affected by this order (16th Oct. 1852; Ord. 59).

ORDER XXXVI. Copies.

ORDER XXXVI.

COPIES.

I. *Copies to be made by Officers of the Court.*

Rule 1. Office copies by whom made.

1. The following copies shall continue to be made by the officers of the Court; that is to say, office copies of proceedings filed in the Record Office; office copies of answers, exceptions, pleas, and demurrers; office copies of depositions of witnesses and examinations of parties to be made for and taken by the party on whose behalf such depositions and examinations are taken; office copies of affidavits (*a*) to be made for and taken by the party filing

the same; and office copies of affidavits to be taken under the 39th Rule of Order XXXV. And such copies shall be written on paper of a convenient size, with a sufficient margin, and in a neat and legible manner, similar to that usually adopted by law stationers; and shall be made by the persons, in the manner, and at the charges (collected by means of stamps), mentioned and prescribed in and by the regulations subjoined to these orders (*b*), and such other regulations as shall for the time being be made in that behalf; and subject thereto, by the persons by whom, and in the manner and at the charges in and at which, they are now made (25th Oct. 1852; Ord. 1, Art. 2).

(*a*) Affidavits, except those filed on interlocutory applications, are now to be printed, Ord. 16 May, 1862, 1, 9, *post*. As to cases where, the matter being pressing, office copies were dispensed with in the long vacation, see p. 465, *ante*.

What affidavits are to be printed.

(*b*) See Regul. as to fees, Appendix, p. xlix. *post*.

Rule *2. Office copies by whom signed.

*2. No office copy of any pleadings, decrees, or orders shall be delivered out of the office of the Clerks of Records and Writs, or shall be capable of being used in court, or in the judge's chambers, unless the same shall have been signed by one of the Clerks of Records and Writs; and no costs of any such copy not so signed shall be allowed on any taxation of costs (23rd June, 1596. Oct. 1622; Ord. 2. Hil. Term, 1667-8; Ord. 7).

Costs of unsigned copies.

II. *Copies to be made by Parties or Solicitors.*

Rule 3. Copies, how made, charged for, &c.

3. Copies of pleadings and other proceedings in the court, and of the documents relating thereto, except such copies as are mentioned in the 1st rule of this order, instead of being made and delivered by the officers of the court at the office in which they are filed or left, shall be made, delivered, charged, and paid for (*c*) according to the following rules of this order (25th Oct. 1852; Ord. 1).

(*c*) See rule 10, *post*.

Rule 4. Application for copies to be in writing, &c.

4. The party or his solicitor requiring any copy, save as excepted in the preceding rule, shall make a written application to the party by whom the copy ought to be

Ord. XXXVI. Copies.

delivered, or his solicitor, with an undertaking to pay the proper charges (25th Oct. 1852; Ord. 1, Art. 2).

Rule 5. By whom copy supplied.

5. Upon such requisition being made, with such undertaking as aforesaid, copies of such pleadings, proceedings, or documents shall be made by the party or his solicitor filing or leaving the same, or who under the 1st rule may have taken office copies thereof (25th Oct. 1852; Ord. 1, Art. 3).

Rule 6. When copy is to be ready.

6. The copies shall be ready to be delivered at the expiration of forty-eight hours after the delivery of such request and undertaking, or within such other time as the Court may in any case direct, and shall be delivered accordingly on demand, upon payment of the proper charges (*d*) (25th Oct. 1852; Ord. 1, Art. 4).

Delivery on payment of charges.

Where copies are not supplied.

(*d*) If the solicitor makes default in supplying the copies, an addition of two days is made to the period for taking any proceeding which may have to be taken after obtaining such copy, Ord. XXXVII. 16, p. 571, *post*.

As to applying for copies of the petition under the Settled Estates Act, see Ord. XLI. 18, 19, p. 600, *post*.

Rule 7. Copies of bills of costs.

7. Copies of bills of costs shall be made side for side so as to correspond with the bills of costs left in the office (25th Oct. 1852; Ord. 1, Art. 6).

Rule 8. Numbering of folios and indorsement.

8. The folios (*e*) of all copies shall be numbered consecutively in the margin thereof; and the name and address of the party or solicitor by whom the same are made shall be indorsed thereon in like manner as upon the proceedings in the court; and such party or solicitor shall be answerable for every such copy being a true copy of the original, or of an office copy of the original pleading, proceeding, or document of which it purports to be a copy, as the case may be (25th Oct. 1852; Ord. 1, Art. 7).

Party or solicitor answerable for truth of copy.

(*e*) The folio is to consist of seventy-two words, and each figure is to count as a word (Regulations as to fees, iv. 4, Appendix, p. xxxvi. *post*).

Rule 9. Time for delivery of copies of affidavits in certain cases.

9. In cases of *ex parte* applications for injunctions or writs of *ne exeat regno* (*f*), the party making such application shall deliver copies of the affidavits upon which it is granted, upon payment of the proper charges, immediately upon the receipt of such written request and undertaking

as aforesaid, or within such time as may be specified in such request or may have been directed by the Court (25th Oct. 1852; Ord. 1, Art. 8).

(*f*) As to this writ, see note (*a*), p. 529, *ante*, head (I).

Rule 10. Production of office copies.

10. Any party or solicitor who has taken any office copy mentioned in the 1st rule shall produce the same in court or at the judge's chambers, when required for the purpose of the proceedings to which the same relates (25th Oct. 1852; Ord. 1, Art. 9).

Rule 11. Copies how written.

11. All copies to be delivered by parties or their solicitors shall be written on paper of a convenient size, with a sufficient margin, and in a neat and legible manner, similar to that which is usually adopted by law-stationers; and unless such copies are so written, the parties or solicitors delivering them shall not be entitled to be paid for the same (25th Oct. 1852; Ord. 2).

Rule 12. Refusal of or default in supplying copies.

12. Where any party or solicitor who is required to deliver any such copy either refuses to deliver the same, or does not deliver the same within the period of forty-eight hours allowed by the 6th rule of this order, the person making such application shall be at liberty to procure a copy from the office in which the original shall have been filed, in the same way as if no such application had been made to the party or solicitor; and in such case no costs shall be due or payable to the party or solicitor so making default in respect of the copy so applied for (25th Oct. 1852; Ord. 3).

Rule 13. Disallowance of cost of copies.

13. The taxing master shall not allow any costs (*g*) in respect of any copy so taken as aforesaid, unless the same shall appear to him to have been requisite, and to have been made with due care, both as regards the contents and the writing thereof (25th Oct. 1852; Ord. 5).

Costs of copies.

(*g*) A defendant's solicitor, furnishing copies of documents which the plaintiff has a right to take himself on their being produced for his inspection under the 15 & 16 Vict. c. 86, s. 18, see note (*o*), p. 172, *ante*, will only be allowed to charge stationers' charges actually incurred (*Kennedy* v. *George*, 6 W. R. 218).

A solicitor concerned for two or more parties is not allowed to charge for supplying to himself copies of documents, which copies he has himself prepared, see *Sharp* v. *Wright*, 1 L. R. Eq. 634.

ORDER XXXVII. Time.

ORDER XXXVII.

TIME.

(*For other Rules relating to Time, see the other Orders, passim*).

I. *Time generally.*

Rule 1. Times same in town and country causes.

1. The times of procedure shall be the same in town causes and country causes (8th May, 1845 ; Ord. 16).

Rule 2. Service of proceedings not requiring personal service to be before 7 p.m., on Saturdays before 2 p.m.

2. Service of all writs, notices, summonses, orders, warrants, documents, and other proceedings, not requiring personal service upon the person to be affected thereby, shall be made before seven o'clock in the evening, except on Saturday, when it shall be made before two o'clock in the afternoon; and if made after seven o'clock in the evening on any day except Saturday, the service shall be deemed as made on the following day; and if made after two o'clock in the afternoon on Saturday, the service shall be deemed as made on the following Monday (2nd Feb. 1857).

Rule 3. Time for demurring alone.

3. A defendant may *demur* alone to any bill within *twelve* days after his appearance thereto, but not afterwards (8th May, 1845 ; Ord. 16, Art. 10) (*a*).

Demurrer with answer.

(*a*) It is therefore always made the special condition of an order giving time to demur, plead, or answer, that he shall *not demur alone* (see Mitf. Plead. 246), and unless the demurrer is accompanied by an answer to some material part of the bill, *Osborn* v. *Jullion*, 3 Drew. 552 ; *Baker* v. *Mellish*, 11 Ves. 73, it must be put in within the twelve days.

Demurrer to part of a bill.

A defendant cannot demur alone to *part* of a bill until the time for filing interrogatories has expired, see note (*w*), p. 167, *ante*.

Time for demurring if defendant is out of jurisdiction.

Twelve days from appearance are allowed in all cases, whether the defendant was served within or without the jurisdiction, and the time which, on service out of the jurisdiction, is limited for a defendant to "plead, answer, or demur, *not demurring alone*," does not preclude him from appearing and demurring after such time has expired, *Grüning* v. *Prioleau*, 33 Beav. 221.

Where plaintiff enters an appearance for defendant.

When the plaintiff *enters an appearance for* a defendant and afterwards amends his bill, the time within which such defendant may demur to the amended bill runs from the date of the service thereof on him (*Cheeseborough* v. *Wright*, 28 Beav. 172).

Where time does not run.

Where the bill had, under the old practice, been referred for *scandal and impertinence*, and so reported, it was held that the defendant might demur after the twelve days (*Nedby* v. *Nedby*, 8 Sim. 334) ; and the time between service of an order that plaintiff give security for costs, and the giving such security, is not reckoned in the twelve days, rule 14, *infra*.

ORDER XXXVII. Time.

Rule *4. Time for *answer*, &c., where answer required.

*4. A defendant required to answer a bill, whether original or amended, must put in his plea, *answer* (*b*), or demurrer thereto, not demurring alone, within *twenty-eight* days (*c*) from the delivery to him or his solicitor of a copy of the interrogatories which he is required to answer (7th Aug. 1852; 1st Set, Ord. 19).

Answer to defendant's interrogatories.

(*b*) A *plaintiff's answer* to interrogatories filed by the defendant is to be put in "in like manner" as if they had been contained in a bill of discovery filed by the defendant against him on the day when such interrogatories shall have been filed, 15 & 16 Vict. c. 86, s. 19, p. 177, *ante*.

When wife obtains order to answer separately.

Where a *wife* obtains an order to *answer separately* for her husband, see p. 435, *ante*, her time for answering ought, it seems, to run only from the date of the order, see *Jackson* v. *Haworth*, 1 S. & S. 161.

As to process for want of answer, see Ord. XII. p. 433, *ante*; and as to applications for further time, see rule 8, *post*.

(*c*) The time for plaintiff to give security for costs is not reckoned, see r. 14.

Rule *5. Time where no answer required.

*5. A defendant *not required to answer* a bill, may, without any leave of the Court, put in a plea, *answer* (*d*), or demurrer, not demurring alone, within *fourteen days* after the expiration of the *time within which he might have been served with interrogatories* for his examination in answer to such bill (*e*).

(*d*) See as to voluntary answers, 15 & 16 Vict. c. 86, s. 13, p. 168, *ante*.

Time for serving interrogatories.

(*e*) The time for service of interrogatories is limited as follows—

1. Where defendant appears.

(α) *If the defendant appears within the eight days* limited for his appearance, interrogatories are to be delivered to him or his solicitor within eight days from the time limited for such appearance, *i. e.*, within sixteen days from service of bill p. 432, *ante*.

2. Where he does not appear within eight days.

(β) *If the defendant fails to appear* within the eight days, then a copy of the interrogatories may be delivered to him *personally* at any time after the eight days, and before his actual appearance.

(γ) If the defendant fails to appear within the eight days, but *appears afterwards*, the copy of the interrogatories may be delivered to *him or his solicitor* within eight days after such appearance.

Time for answer.

Hence the time for a voluntary answer is—

(1) Where defendant appears.

(α) Thirty days, if the defendant appears within the eight days limited for appearance;

(2) Where defendant makes default in appearing.

(β) and (γ) If he makes default in appearing, the case appears to form a *casus omissus* from the order; for it could hardly be contended that a defendant is entitled to take advantage of his own default for the purpose of getting further time to put in his answer. It is submitted that the rule ought to be held only to apply to the case of a defendant not making default.

Further time given.

Further time may be given, rr. 17, 18, *post*. Where a demurrer had been put in without effect, further time was given to put in a voluntary answer, *Mullins* v. *Hussey*, 15 W. R. 657.

Rule *6. Time for answer to amendments and exceptions together.

*6. Where a defendant is ordered to answer *amendments and exceptions together*, he must put in his further answer and his answer to the amendments of the bill within *fourteen* days after he shall have been served with interrogatories for his examination in answer to the amended bill (*f*).

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Where he does not, and procures no enlargement of the time allowed, he shall be subject to the following liabilities:—

Consequences of default.

Article (1). (1.) An attachment may be issued against him (*g*);

Article (2). (2.) He may be committed to prison, and brought to the bar of the court;

Article (3). (3.) The plaintiff may file a traversing note, or proceed to take the bill *pro confesso* against him (8th May, 1845; Ord. 16, Art. 15) (*h*).

(*f*) This rule only refers to amendment after answer (*Rigby* v. *Rigby*, 9 Beav. 311).

(*g*) See note (*d*), p. 514, *ante*, as to the evidence of service of interrogatories necessary to found an attachment.

Defendant making default in answering altogether.

(*h*) It has been suggested that this rule is defective, inasmuch as it does not state what will be the consequences of a defendant making default in answering altogether the amendments and exceptions. The 5th rule of the Preliminary Order has been referred to as rectifying the defect (if any); but the sounder opinion seems to be, that the right of the Court to attach or commit a defendant for contempt, in not conforming to its orders, is a matter of inherent jurisdiction, and does not depend upon any general order.

Rule *7. Time for answer to amendments, where no answer required.

*7. When the plaintiff amends his bill *without requiring an answer to the amendments*, a defendant who has answered or has not been required to answer the original bill, but desires to answer the amended bill, must put in his answer thereto within *fourteen days* after the expiration of the *time within which*, if an answer had been required, *he might have been served with interrogatories for his examination in answer to such amended bill* (*i*), or within such further time as the judge may allow (8th May, 1845; Ord. 16, Art. 38).

Time for putting in voluntary answer to amended bill.

(*i*) The time limited for a plaintiff to file his interrogatories to an amended bill is *eight days* from the time limited for the appearance of the defendant, Ord. XI. 3, *ante*, p. 432. The defendant, however, is not bound to appear at all to an amended bill unless he desires to answer it (see note (*e*) p. 421, *ante*), in which latter case he must appear within *eight days*.

Therefore the defendant is to have 8 + 8 + 14 (= 30) days for the time within which the answer is to be put in. See note (*e*), last page.

Where the *appearance has been entered for* the defendant, and the bill is afterwards amended, the time for such defendant to put in a voluntary answer to the amended bill runs from the time of the service of the amended bill on him (*Cheeseborough* v. *Wright*, 28 Beav. 173).

Rule 8. Extension of time to answer.

8. Where a defendant, using due diligence, is unable to put in his answer to a bill within the times allowed by these orders, the judge, on sufficient cause being shown,

may, as often as he shall deem right, allow to such defendant such further time and on such (if any) terms as to the judge shall seem just (8th May, 1845; Ord. 18. 7th Aug. 1852; 1st Set, Ord. 19) (*k*).

(*k*) The application is to be made in chambers, p. 146, *ante*.

Application for further time to answer when granted.

The first application is not of course, but must be supported by affidavit (*Brown* v. *Lee*, 11 Beav. 162); but the judge will usually rely on the statements of counsel as to the time required by him (*Byng* v. *Clark*, 13 Beav. 92, where the time for answering was enlarged on five successive occasions); and on application for time to answer, it must be considered that the answer is necessary not only for enabling the defendant to give the discovery required, but to state his own defence (*York and Midland Railway Company* v. *Hudson*, *ibid.* 69).

A defendant in contempt cannot apply, *Wheat* v. *Graham*, 5 Sim. 570; see, however, *Davis* v. *Tollemache*, 2 Jur. N. S. 564, and note (*a*), p. 609, *post*.

Documents to be produced.

On applications for time to answer, a printed copy of the bill and the interrogatories must be produced (2nd Regul. as to business, Aug. 8, 1857, Appendix, p. liii. *post*).

Filing plea under order to answer, &c.

Under an order giving further time to answer, the defendant may, it seems, put in a plea (*Hunter* v. *Nockolds*, 12 Jur. 149); but see *Philips* v. *Gibbons*, 1 V. & B. 184; *Taylor* v. *Milner*, 10 Ves. 444; *Newman* v. *White*, 16 Beav. 4; Mitf. Plead. 246, note (*o*).

As to an order giving time to file an answer to a cross bill, see *Lafone* v. *Falkland Islands Company*, 2 K. & J. 276; and as to applications for time to answer where a defendant submits to exceptions, *Manchester, &c. Railway Company* v. *Worksop Board of Health*, *ibid.* 25, and see p. 470, *ante*.

An attachment sued out pending the discussion of an order for further time to answer, will be discharged as irregular (*Davis* v. *Tollemache*, 2 Jur. N. S. 564).

II. *Computation of Time.*

Rule 9. Limited time, not limited by hours, how computed.

9. Where any limited time from or after any date or event is appointed or allowed for doing any act or taking any proceeding, and such time is not limited by hours, the computation of such limited time shall not include the day of such date or of the happening of such event, but shall commence at the beginning of the next following day; and the act or proceeding shall be done or taken at the latest on the last day of such limited time according to such computation (8th May, 1845; Ord. 11).

Rule 10. Months.

10. Where the time for doing any act or taking any proceeding is limited by months not expressed to be calendar months, such time shall be computed by lunar months of twenty-eight days each (8th May, 1845; Ord. 12).

Rule *11. Sundays and days on which offices are closed when excluded.

*11. Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sundays, and other days on which the offices are closed, except Monday and

ORDER XXXVII. Time.

Tuesday in Easter week, shall not be reckoned in the computation of such limited time.

Rule 12. When time expires on Sunday or day on which offices are closed.

12. Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next open (8th May, 1845; Ord. 13) (*l*).

Closing of offices.

(*l*) Where the time for doing an act, or taking a proceeding is expressly fixed by Act of Parliament, this rule does not enable such act or proceeding to be done or taken after the expiration of the time so fixed, *Flower* v. *Bright*, 2 J. & H. 590.

Rule 13. Where vacation not reckoned.

13. The times of vacation (*m*) shall not be reckoned in the computation of the times appointed or allowed for the following purposes:—

Article (1). (1.) Amending or obtaining orders for leave to amend bills.

Article (2). (2.) Filing or setting down exceptions for scandal or insufficiency, in cases where the time is not limited by notice given pursuant to the 6th Rule of Order XLII.

Article (3). (3.) Setting down pleas and demurrers.

Article (4). (4.) Filing replications (*n*), or setting down causes under the 12th Rule of Order XXXIII., in cases where a defendant puts in an answer to amendments to which the plaintiff has not required an answer (*o*) (8th May, 1845; Ord. 14. 2nd Nov. 1850; Ord. 4).

When time runs during vacation.

(*m*) In all cases not specified in this rule vacations are to be counted in the computation of time, see *Bothomley* v. *Squire*, 7 D. M. G. 246; *Ware* v. *Watson*, *ibid.* 789; *Hitchin* v. *Hughes*, 14 W. R. 93.

(*n*) See *Stinton* v. *Taylor*, 4 Hare, 408, where it was held that the rule does not apply to the filing of replications *generally*.

(*o*) See p. 538, *ante*.

Rule 14. Where time for giving security for costs not reckoned.

14. The day on which an order that the plaintiff do give security for costs is *served* (*p*), and the time thenceforward until and including the day on which such security is given, shall not be reckoned in the computation of time allowed a defendant to plead, answer, or demur, or

otherwise make his defence to the suit (8th May, 1815; Ord. 15).

ORDER XXXVII. Time.

(*p*) Merely *taking out the summons* for security for costs does not prevent the time from running, *Henderson* v. *Atkins*, 7 W. R. 318. If, therefore, there is danger of the time running out before the order is made, the defendant should plead, answer, or demur, giving notice that he does so without prejudice to his right to call for security, *Drinan* v. *Mannix*, 3 Dr. & W. 155.

Time runs until order is served.

15. Where the fourteen days within which, pursuant to the orders of the Court, a defendant is bound to file his affidavits in answer to a motion for a decree, or the seven days within which the plaintiff is bound to file his affidavits in reply thereto, or the eight weeks after issue joined within which the evidence in any cause to be used at the hearing thereof is to be closed, or the month after the expiration of such eight weeks within which a witness who has made an affidavit intended to be used by any party to such cause at the hearing thereof is subject to cross-examination (*q*), shall expire in the long vacation, the time for the several purposes aforesaid respectively is hereby extended to the fifth day of the ensuing Michaelmas Term, and shall expire on that day, unless enlarged by order. And in cases where the above-mentioned periods of fourteen days and eight weeks respectively shall be extended by virtue of this order, the seven days within which the plaintiff is bound to file his affidavits in reply, and the month during which a witness is subject to cross-examination, shall be respectively taken to commence from the expiration of such extended periods respectively (1st June, 1854; Ord. 1. 13th Jan. 1855; Ord. 5)(*r*).

Rule 15. Cases where time is extended, the period expiring in the long vacation.

(*q*) This part of the rule will only apply to causes where issue is joined, if the parties agree to follow the old practice, see note (*u*), p. 184, *ante*, and Ord. 5th Feb. 1861, r. 10, p. 623, *post*.

Where issue joined.

(*r*) A question may arise as to whether this rule applies to cases where the time has been enlarged, and the enlarged period expires in the vacation. The Master of the Rolls, in *Clark* v. *Malpas*, January 13, 1862, expressed an opinion that it did so apply, but the point was not expressly determined.

Where *additional* time expires in vacation.

16. Where a party or solicitor by whom any copy ought to be delivered, pursuant to Order XXXVI., refuses to deliver the same, or does not deliver the same within the period of forty-eight hours allowed by the 6th rule of that order, an addition of two clear days shall be made to the

Rule 16. Additional time in case of default of solicitor in delivering copies.

ORDER XXXVII. Time.

period within which any proceeding which may have to be taken after obtaining such copy ought to be so taken, so that the person requiring such copy may be as little prejudiced as possible by the neglect of the solicitor to deliver such copy (25th Oct. 1852; Ord. 4).

III. *Power of the Court as to Time.*

Rule *17. Power to Court or judge in chambers to enlarge or abridge time.

*17. The power of the Court or the judge at chambers (*s*) to enlarge or abridge the time for doing any act or taking any proceeding, upon such, if any, terms as the justice of the case requires, shall not be affected by these orders (8th May, 1845; Ord. 21. 7th Aug. 1852; 1st Set, Ord. 46).

Application for further time by summons in chambers.

Or by motion.

(*s*) Applications for further time to answer (rule 8, *ante*), and to file interrogatories (Ord. XI. 3), are ordered to be made at chambers, p. 146, *ante*, and it seems by this rule that applications for further time generally should be made at chambers.

In *Southampton, &c. Steamboat Company* v. *Rawlins*, 13 W. R. 512, it was held that applications for enlargement of time need not be made before the expiration of the time allowed by the orders; but *when the time allowed has expired*, the application is by motion; p. 530, *ante*, head (12).

Rule 18. Further enlargement of time.

18. Where the Court or the judge at chambers is authorised to appoint the time for any proceeding, or to enlarge the time allowed for any proceeding by general order, the Court or the judge at chambers may further enlarge any time so appointed or enlarged, and on such, if any, terms as shall be deemed just, provided the application for such enlargement is made before the expiration of the time previously allowed, and such enlargement appears to be required for the purposes of justice, and not with a view to create unnecessary delay (8th May, 1845; Ord. 20).

ORDER XXXVIII. Solicitors' Fees.

ORDER XXXVIII.

SOLICITORS' FEES.

Rule 1. Costs incurred before Feb. 1, 1857.

1. So far as regards all costs incurred before the 1st of February, 1857, solicitors shall be entitled to charge and be allowed the fees which they were entitled to charge and

ORDER. XXXVIII. Solicitors' Fees.

be allowed immediately before the order of the 30th of January, 1857, was made (30th Jan. 1857; Ord. 1 and 4).

Rule 2. Costs incurred on and after Feb. 1, 1857.

2. So far as regards all costs incurred on and subsequently to the 1st of February, 1857, solicitors shall be entitled to charge and be allowed the fees set forth in the regulations as to solicitors' fees subjoined to these orders, and in such other regulations as may from time to time be made in that behalf by the Lord Chancellor, by and with the advice and assistance of the other Equity judges, or the greater number of them (30th Jan. 1857; Ord. 1 and 4) (*a*).

(*a*) See regulations as to solicitors' fees, Appendix, p. xxxiii. *post.*

ORDER XXXIX.

Court Fees.

ORDER XXXIX. Court Fees.

Rule 1. Fees before Feb. 1, 1857.

1. So far as regards the fees of court before the 1st of February, 1857, the same shall be regulated in the same manner as they were regulated immediately before the Order of the 30th of January, 1857, was made (30th Jan. 1857; Ord. 1 and 4).

Rule 2. Fees on and after Feb. 1, 1857.

2. So far as regards the fees of court on and subsequently to the 1st of February, 1857, the same shall be regulated by the regulutions subjoined to these orders, and by such other regulations as may from time to time be duly made in that behalf (30th Jan. 1857; Ord. 1 and 4) (*a*).

(*a*) See Appendix, p. xxxiv. *post.*

Rule 3. Fees to be collected by stamps.

3. The fees of court (save as provided by the 8th rule of this order) shall be collected, not in money, but by means of stamps (*b*) denoting the amount of such fees, to be provided and used as by the Stat. 15 & 16 Vict. c. 87, is directed. And the stamps for denoting the amount of such fees shall be of the amounts set forth in the regulations as to court fees subjoined to these orders, and in such other regulations as may from time to time

Amounts.

ORDER XXXIX. Court Fees.

be duly made in that behalf (7th Sept. 1852. 25th Oct. 1852; Ord. 6. 3rd Dec. 1852; Ord. 1. 4th Dec. 1852; Ord. 2. 26th July, 1855).

Regulations as to stamps.

(*b*) See ss. 6 and 7, of the Suitors' Relief Act, p. 227, *ante*, and Regul. as to fees, Appendix, pp. xlvii.—lii. *post*.

Several stamps together, making up the amount payable, may, it seems, be used (*Brain* v. *Brain*, 9 Hare, App. xc.), but see rule 7, *infra*.

A printed bill need not be stamped as well as a written one (*Jones* v. *Batten*, 9 Hare, App. lvii.).

As to stamps on amended petitions, see *Robinson* v. *Harrison*, 1 Drew. 307.

Rule 4. Inland Revenue Commissioners to give directions for carrying order into effect.

4. The Commissioners of Inland Revenue shall from time to time give the necessary directions for carrying this order into effect, as is provided by the said last-mentioned Act. And the said Commissioners shall once in every month cause to be paid into the Bank, to the credit of the Accountant-General, to the account there intituled "The Suitors' Fee Fund Account," such sums of money as may have been received by them for the stamps hereinbefore mentioned, after deducting the costs, charges, and expenses incurred by them or by their direction in carrying this order into effect, and all sums of money repaid on allowance for spoiled stamps; and notice of each such payment shall, at the time of making the same, be given by the said Commissioners to the Accountant-General, who shall certify the amount of such payment to the Court (7th Sept. 1852. 25th Oct. 1852; Ord. 6. 3rd Dec. 1852; Ord. 1. 26th July, 1855).

Rule 5. Stamps how used.

5. Such stamps shall be stamped or affixed at the expense of the parties liable to pay the fees, on or to the vellum, parchment, or paper on which the proceedings in respect whereof such fees are payable are written or printed, or which may be otherwise used in reference to such proceedings. And where any of such fees are payable in respect of any matter or thing to be done by any officer or in any office of the court, and it has not been customary to use, in reference to such matter or thing, any written or printed document or paper whereon the stamp could be stamped or affixed, the party or his solicitor requiring such matter or thing to be so done, shall make application for the same by a short note, or

memorandum in writing, and a stamp denoting the amount of the fee so payable shall be stamped on or affixed to such note or memorandum (25th Oct. 1852; Ord. 6. 3rd Dec. 1852; Ord. 2. 4th Dec. 1852; Ord. 2). ORDER XXXIX. Court Fees.

6. Every officer of the Court of Chancery (other than a solicitor, as such) who shall receive any document to which a stamp shall be affixed, pursuant to the provisions of this order, shall, immediately upon the receipt of such document, cancel or deface the stamp thereon, by writing upon such stamp his name or the initial letters of his name, in such a manner as to show clearly and distinctly that such stamp has been made use of, and so that the same may not be again used; and no such document shall be filed or delivered out until the stamp thereon shall have been cancelled or defaced in manner aforesaid (1st Aug. 1856; Ord. 2). Rule 6. How defaced.

7. Where stamps impressed upon adhesive paper are used, the stamp affixed to the document shall be of an amount corresponding as nearly as is practicable with the amount of the stamp which such document requires, in order that no greater number of adhesive stamps may be affixed to any document than is actually necessary (1st Aug. 1856; Ord. 3) (*c*). Rule 7. Number of stamps.

(*c*) See note (*b*), last page.

8. Where costs are directed to be paid out of a fund in court, the fees of taxation shall not be payable by means of stamps, but shall be carried over by the Accountant-General to the credit of the Suitors' Fee Fund; and, to that intent, the taxing master shall in such cases certify the amount of such fees (25th Oct. 1852; Ord. 7). Rule 8. Fees where costs paid out of fund in court.

ORDER XL.

ORDER XL. Costs, Charges, and Expenses, generally.

COSTS, CHARGES, AND EXPENSES, GENERALLY (*a*).

1. The taxing masters (*b*) shall perform all such duties as were formerly referred to or performed by the Masters Rule 1. Duties, &c., of taxing masters

ORDER XL. Costs, Charges, and Expenses generally.

in Ordinary in relation to the taxation of costs, and shall in respect thereof have all such powers and authorities as were formerly vested in the Masters in Ordinary,

To administer oaths,

To examine witnesses and parties,

To order the production and inspection of books, papers, and documents,

To proceed *de die in diem*,

To make separate reports and certificates,

To require that any party be represented by a separate solicitor (*c*),

And to direct and adopt all such other proceedings as might formerly be directed and adopted by the Masters in Ordinary, on references for the taxation of costs, and taking accounts of what is due in respect of such costs, and such other accounts connected therewith as may be directed by the Court (26th Oct. 1842; Ord. 9).

Costs.

(*a*) As to costs generally, see Morgan & Davey on Costs; and as to enforcing orders for payment of costs, see *ante*, p. 27, note (*l*), and as to interest on costs, see p. 28, *ante*.

Taxation under 6 & 7 Vict. c. 73.

(*b*) If the order to tax is made on petition under the 6 & 7 Vict. c. 73, the Court will give no relief as to any matters unconnected with the bill of costs. See note (*s*), p. 19, *ante*; Seton, 833; *King* v. *Savery*, 8 D. M. G. 311.

Taxing master may consider question of retainer,

As to the taxing master's powers generally, see *Clayton* v. *Meadows*, 2 Hare, 32; *Re Atkinson*, 26 Beav. 51. He may consider the question of retainer, see Seton, 836, 837, 838.

In *Graham* v. *Wickham*, 13 W. R. 396, it was held that they might allow executors their costs of litigation, though no direction was given in the suits in which such costs were incurred that they should be so allowed.

but not extraordinary costs.

His province generally is to deal only with ordinary costs: any extraordinary question must come before the judge in chambers, see *Turner* v. *Turner*, 7 W. R. 573; *King* v. *Savery*, 8 D. M. G. 311; *Re Catlin*, 18 Beav. 511. Compare 15 & 16 Vict. c. 80, s. 27, and note, p. 149, *ante*.

Discretion as to items.

In considering whether a bill has been overpaid, he will consider all sums received by the solicitor in that character, see *Cooper* v. *Ewart*, 2 Ph. 362, and note (*s*), p. 19, *ante*.

See further as to taxing master's discretion to tax costs of unnecessary pleadings, s. 9, *post*; of counsel setting drafts, s. 17, *post*; of counsel appearing, s. 20, *post*; of conveyancing counsel of the court, s. 30, *post*; of solicitor's business, s. 32, *post*.

Parties to attend taxation.

(*c*) It is in the discretion of the taxing master to determine who are the proper parties to attend the taxation, and where he had excluded a party on the ground of want of a separate interest, the Court would not disturb the decision (*Stahlschmidt* v. *Lett*, 9 W. R. 830. Compare note (*x*), p. 551, *ante*, as to separate appearances.

Rule 2. Order of reference.

2. All references for the taxation of costs shall be made to the taxing master in rotation (*d*); or if there shall have

been any former taxation of costs in the same cause or matter, then to the taxing master before whom such former taxation shall have taken place (26th Oct. 1842; Ord. 10).

(*d*) As to days set apart for taxation, see *Re Harvey's Settlement*, 10 Hare, Appendix, lxxv.; and see generally as to proceedings on taxation, Morgan & Davey, 339.

Proceedings on taxation.

Rule 3. Taxing masters to assist each other.

3. The taxing masters shall be respectively assistant to each other; and in the discharge of their duties, and for the better despatch of the business of their respective offices, any taxing master may tax or assist in the taxation of a bill of costs which has been referred to any other taxing master for taxation, and for ascertaining what is due in respect of such costs, and in such case shall certify accordingly (26th Oct. 1842; Ord. 15).

Rule 4. Costs of solicitor guardian ad litem.

4. Where the Court appoints one of the solicitors of the court to be *guardian ad litem* of an infant or person of unsound mind, the Court may direct that the costs to be incurred in the performance of the duties of such office shall be borne and paid, either by the parties or some one or more of the parties to the suit in which such appointment is made, or out of any fund in court in which such infant or person of unsound mind may be interested, and may give directions for the repayment or allowance of such costs, as the justice and circumstances of the case may require (26th Oct. 1842; Ord. 28) (*e*).

(*e*) See Ord. VII. 3, p. 400, *ante*.

Costs of guardian ad litem appointed under Order VII. 3.

Where the solicitor to the Suitors' Fee Fund is appointed guardian to a defendant who is an infant, or of unsound mind, at the instance of the plaintiff, it is the settled rule that the plaintiff shall pay his costs in the first instance, and add them to his own (*Frazer* v. *Thompson*, 4 De G. & J. 659; *Newbury* v. *Marten*, 15 Jur. 166); even in a foreclosure suit, where the security is insufficient, *Harris* v. *Hamlyn*, 3 De G. & S. 470: see *Ex parte Davies*, 16 Jur. 882. But in a partition suit, the guardian's costs were ultimately charged on the infant's share, *Robinson* v. *Aston*, 9 Jur. 224; and see *Robey* v. *Whitewood*, there cited.

The Court has no jurisdiction to order the costs of a defendant to whom the solicitor to the Suitors' Fee Fund is appointed guardian to be paid out of the suitors' fund (*Frazer* v. *Thompson*, 4 De G. & J. 659).

Where lunatic recovers.

Where a person of unsound mind, to whom a guardian *ad litem* has been appointed, recovers before the hearing, he must pay the costs of the guardian before obtaining an order to substitute his own solicitor, but may add such costs to his own costs of suit (*Frampton* v. *Webb*, 11 W. R. 1018).

Solicitor to suitors fee

Where the solicitor to the Suitors' Fee Fund is appointed guardian *ad litem* to an infant defendant, and also appears for other parties defending *in formâ*

ORDER XL. Costs, Charges, and Expenses generally.

pauperis, he will be entitled to his full costs in each case, notwithstanding the rule in *Re Colquhoun*, 5 D. M. G. 35, which was held not to apply, *Frazer* v. *Thompson*, 1 Giff. 337.

fund appearing for two parties.

Rule 5. Party suing or defending in formâ pauperis to be paid dives costs.

5. Where costs are ordered to be paid to a party suing or defending *in formâ pauperis*, such costs shall be taxed as *dives* costs, unless the Court shall otherwise direct (10th Dec. 1849) (*f*).

(*f*) See note (*m*), p. 405, *ante*.

This rule was in *Mornington* v. *Keane*, 3 W. R. 429, held to apply to the costs of an abandoned motion, as to which see rule 23, *post*; and *Rubery* v. *Morris*, 18 L. J. Ch. 444.

Rule 6. Security for costs where plaintiff out of jurisdiction.

6. One hundred pounds (*g*) shall be the penal sum in the bond to be given as a *security to answer costs* (*h*) by any plaintiff who is out of the jurisdiction of the Court (3rd April, 1828; Ord. 40) (*i*).

Amount of security for costs.

(*g*) The amount formerly fixed was 40*l.*, which is still sufficient when a *petitioner* is required to give security, *Re Pasmore*, 1 Beav. 94; *Atkins* v. *Cook*, 5 W. R. 381. As to security by a company, see *Imperial Bank of China* v. *Bank of Hindostan*, 1 L. R. Ch. 437.

Increased in special cases.

The amount may be increased if the plaintiff is asking for some indulgence, *e. g.*, to change a next friend or to *strike out the names of co-plaintiffs*, see *Fellowes* v. *Deere*, cited in note (*p*), p. 217, *ante*; *Payne* v. *Little*, 16 Beav. 563. A reference may be directed to fix the amount; but see *Davey* v. *Bennett*, 3 W. R. 353; *Hart* v. *Tulk*, 6 Hare 612.

100*l.* paid into court.

The plaintiff has been allowed to pay 100*l.* into court instead of giving security; paying at the same time a sufficient sum to cover the expense of payment in and out (*Cliffe* v. *Wilkinson*, 4 Sim. 122), and paying the costs of the application, *Matthews* v. *Chichester*, 31 Beav. 135.

Who may be surety: *not* the solicitor.

The solicitors' undertaking to be answerable for costs is not sufficient, *Panton* v. *Labertouche*, 1 Ph. 265; *Re Norman*, 11 Beav. 401; and the surety must be solvent, *Cliffe* v. *Wilkinson*, l. c.; On the bankruptcy of a surety proceedings may be stayed, see *Lautour* v. *Holcombe*, 1 Ph. 262; *Veitch* v. *Irving*, 11 Sim. 122; and the defendant's costs of sending a clerk abroad to inquire into the solvency of the surety were allowed, *Bainbridge* v. *Moss*, 3 K. & J. 62. The bond of the British Guarantee Association, incorporated by Act of Parliament, was accepted as sufficient, *Plestow* v. *Johnson*, 1 Sm. & Giff. App. xx.

Solvency of surety.

Guarantee Society.

Order how applied for.

(*h*) Application for the order that a plaintiff may give security for costs should be made by summons in chambers, *Tynte* v. *Hodge*, 2 J. & H. 692; and see Morgan & Davey on Costs, 16. The order is that all proceedings be stayed till security is given, *Fox* v. *Blew*, 5 Madd. 147; Seton, 1269.

Security how given.

The security is to be given to the Clerk of Records and Writs in whose division the cause or matter is, Ord. I. 38 (p. 380); and after the order is made, the time until security is given is not reckoned in the time allowed for pleading and demurring, Order XXXVII. 14, p. 570, *ante*.

Where several defendants.

Where there are several defendants, each may have a separate security, but the plaintiff need only divide one penalty among all, *Lowndes* v. *Robertson*, 4 Madd. 465.

Where plaintiff fails to give security ordered.

Where a plaintiff is ordered to give security, and makes default, the defendant may move that he give security within a certain time, or that the bill be dismissed, see *Cooper* v. *Purton*, 1 N. R. 468, citing *Giddings* v. *Giddings*, 10 Beav. 29, and see note (*l*), p. 535, *ante*.

Discharge of order.

The order was discharged on a plaintiff coming within the jurisdiction in *Matthews* v. *Chichester*, 30 Beav. 135; *O'Connor* v. *Sierra Nevada Company*, 24 Beav. 435.

A plaintiff though suing in a representative character, *e.g.*, as an executor, *Knight* v. *De Blaquiere*, Sausse & Scully, 651, or as next friend, *supra*, must give security.

Plaintiff executor must give security.

The rule applies to several co-plaintiffs who are all out of the jurisdiction, but no order will be made on a plaintiff residing abroad to give security for costs if there are co-plaintiffs residing in England (*Winthorp* v. *Royal Exchange Assurance Company*, Dick. 282; *Walker* v. *Easterby*, 6 Ves. 612); but *quære* where all the plaintiffs are out of the jurisdiction, but one of them sues by a next friend in this country (*Lander* v. *Parr*, 16 L. J. Ch. 269; and see *Smith* v. *Etches*, 1 H. & M. 558).

Where some of several co-plaintiffs are within jurisdiction.

A person presenting a petition in a cause to which he is not a party must give security, if residing abroad (*Atkins* v. *Cooke*, 4 Drew. 694; *Partington* v. *Reynolds*, 6 W. R. 307; *secus* where the petitioner is a party; *Cochrane* v. *Fearon*, 18 Jur. 563); so must a petitioner under an Act of Parliament, *Ex parte Seidler*, 12 Sim. 106; Morgan & Davey on Costs, 12.

Petitioners giving security.

A suit revived is so far considered a new suit as to entitle the defendant to move that the plaintiff, if resident abroad, do give security for costs (*Jackson* v. *Davenport*, 29 Beav. 212).

Parties reviving,

As to obtaining security for the costs of an issue directed to be tried at law, see *Annesley* v. *Simeon*, 4 Madd. 390; *Deprez* v. *Mitchell*, 5 Madd. 87; *Hilton* v. *Lord Granville*, 5 Beav. 263.

or obtaining issue at law,

Security for costs may be required from a defendant obtaining the conduct of the cause (*Mynn* v. *Hart*, 9 Jur. 860), and from a defendant in an interpleader suit, being in the position of a plaintiff (*Smith* v. *Hammond*, 6 Sim. 15).

or obtaining conduct of cause,

(*i*) The following are the cases in which a plaintiff is required to give security for costs (unless the suit is a *cross suit*, see head (4), next page)—

or interpleader suit.

(1) When he is *resident* out of the jurisdiction (under the rule in the text), and a plaintiff *domiciled* abroad, and only lodging in London had to give the security, *Ainslie* v. *Sims*, 17 Beav. 57; see *Swanzy* v. *Swanzy*, 4 K. & J. 237; *Cambottie* v. *Inngate*, 1 W. R. 533.

(A) Cases where security for costs *must be given*: (1) If plaintiff *resides* or is *domiciled* or *goes abroad*;

So if a plaintiff goes abroad during the suit, *Green* v. *Charnock*, 1 Ves. Jun. 396; *Hoby* v. *Hitchcock*, 5 Ves. 699; *Blakeney* v. *Dufaur*, 2 D. M. G. 271; *Edwardes* v. *Burke*, 9 L. T. N. S. 406; *Kennaway* v. *Tripp*, 11 Beav. 588; *Stewart* v. *Stewart*, 20 Beav. 322; and see *Baddeley* v. *Harding*, 6 Madd. 214; where the plaintiff was under sentence of transportation, *Seilaz* v. *Hanson*, 5 Ves. 261 (but if the plaintiff goes abroad on public service or for a temporary purpose the rule does not apply, see exception (1), *infra*, and (2), next page).

(2) When a plaintiff misdescribes himself see note (*a*), Appendix, p. ii., *post*; and see as to misdescription in an *amended bill*, the plaintiff having changed his residence, *Kerr* v. *Gillespie*, 7 Beav. 269; *Campbell* v. *Andrewes*, 12 Sim. 578. (See, however, exception (3), next page).

(2) If plaintiff misdescribes himself;

(3) Where a *married woman* sues; see note (*t*), p. 166, *ante*; or a person privileged from process for contempt, *e. g.*, ambassadors' servants, *Goodwin* v. *Archer*, 2 P. W. 452; *Adderly* v. *Smith*, 1 Dick. 355; but as to ambassadors themselves, see *Duke de Montellano* v. *Christian*, 5 M. & S. 503.

(3) If plaintiff is married woman or privileged person.

(4) If a plaintiff amends by striking out names of co-plaintiffs, *Fellowes* v. *Deere*, cited note (*p*), p. 217, *ante*.

(4) If co-plaintiffs are struck out.

The following are exceptions where security for costs is not required from a plaintiff abroad:

(B) Exceptions where security is *not* required:

(1) A plaintiff abroad on *public service*, *Colebrook* v. *Jones*, Dick. 154 (where the plaintiff was a consul abroad). So a naval officer holding a situation abroad (*Evelyn* v. *Chippendale*, 9 Sim. 407; and see *Clark* v. *Fergusson*, 1 Giff. 184); or a military officer serving with his regiment abroad (*Fisher* v. *Bunbury*, Sausse & Scully, 625), are exempted. *Secus* in the case of an officer on half-pay and *resident abroad* (*Lony* v. *Tottenham*, 1 Ch. Rep. 127), and a plaintiff described in the bill as "a lieutenant in her Majesty's 58th regiment, resident at Ceylon, in the East Indies," was compelled to give security, though it appeared that the regiment was in Ceylon, for it must distinctly appear that the plaintiff is abroad on foreign *service*. There seems to be no exemption in favour of a seafaring man, for when a plaintiff described himself as "of the ship W——, now on her voyage to Sydney, and

(1) Where plaintiff is abroad on public service;

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back to London," it was held that he must give security for costs (*Stewart* v. *Stewart*, 20 Beav. 322; but see *Lumley* v. *Hughes*, 2 W. R. 112; *Watts* v. *Kelly*, 6 W. R. 206; *Partington* v. *Reynolds*, 6 W. R. 307; and the contrary was held in *Gowram* v. *Bennett*, Sausse & Scully, 651.

or (2) only abroad temporarily;

(2) So if the plaintiff is gone abroad for a temporary purpose without abandoning his residence in this country, see *Green* v. *Charnock*, and other cases cited *supra*, under head (1); but compare *O'Connor* v. *Sierra Nevada Company*, 23 Beav. 608.

(3) If a misdescription is not with intent to deceive.

(3) If a misdescription is innocently inserted, and the defendant knows the real address, a motion for security for costs will be refused, *Smith* v. *Comfort*, 1 De G. & S. 684; and for instances of accidental errors in the plaintiff's description on account of which security was not required, see *Watts* v. *Kelly*, 6 W. R. 206; *Clark* v. *Clark*, 14 W. R. 449: and it is the defendant's duty, if the plaintiff cannot be found at the place of residence named in the bill, to make inquiries from the solicitor before he applies for security, *Knight* v. *Cory*, 11 W. R. 254; *Bailey* v. *Gundry*, 2 Keen, 53; *Manby* v. *Bewicke*, 8 D. M. G. 468; see *Hutchinson* v. *Swift*, 13 W. R. 532; *Dick* v. *Munden*, *ibid.* 1013; where the order was that the plaintiff should amend within a week by inserting his proper address, or else should give security.

Defendant should make inquiries to find plaintiff.

(4) If the suit is a cross suit,

A plaintiff in a cross suit is not required to give security for costs, *Vincent* v. *Hunter*, 5 Hare, 320; *Wild* v. *Murray*, 18 Jur. 892; *Accidental & Marine Insurance Company* v. *Mercati*, 3 L. R. Eq. 200. This rule will apply, as between the plaintiff in the original suit and the plaintiff in the cross suit, though other matters are comprised in the cross bill; but it seems that defendants to the cross suit, not parties to the original suit, may have security (*Wild* v. *Murray*, *supra*; *Sloggett* v. *Viant*, 13 Sim. 187).

or in defence to action at law;

A plaintiff filing a bill to restrain an action is within this rule (*Watteau* v. *Billam*, 3 De G. & Sm. 516; *Re Accidental, &c. Insurance Company*, 15 W. R. 88; though the bill also seeks other relief (*Wilkinson* v. *Lewis*, 3 Giff. 394).

but if it is really an original suit security must be given.

Where a suit was instituted for the purpose of impeaching an annuity deed, on the footing of which a decree had already been made in a former suit, it was held that the suit was not a proceeding by way of defence or a cross suit, so as to exempt the plaintiff from the ordinary rule, *Tynte* v. *Hodge*, 2 J. & H. 692; and where A. filed a bill against B. for specific performance of an agreement to transfer shares, and the company then filed a bill against A. and B. praying for a declaration that the contract was void, A. was allowed to call on the company to give security for costs, *Washoe Mining Company* v. *Ferguson*, 2 L. R. Eq. 371.

Security not required merely because plaintiff is poor,

Nor is security for costs required from any plaintiff who is *sui juris* merely on account of his poverty, because he can be attached, *Hind* v. *Whitmore*, 2 J. & H. 562; but see *Burke* v. *Hutchinson*, 7 Ir. Eq. Rep. 708, where a pauper was ordered to give security for costs; this case, however, which the Court considered one of gross fraud, depended on the special circumstances, and would not probably be generally followed; see the comments on it in *Worrall* v. *White*, 3 Jo. & Lat. 513. There is also a case in the Exchequer (*Tredwell* v. *Byrch*, 1 Yo. & Coll. 476), in which a plaintiff, who filed a bill on behalf of himself and all other the rated inhabitants of a parish against certain commissioners, alleging a case of breach of trust, was ordered to find security for costs, on account of his insolvency.

except from a relator.

A relator in a charity information, however, may be required to give security for costs on the ground of his poverty (*Attorney-General* v. *Skinners' Company*, 1 C. P. C. 1, 5; *Attorney-General* v. *Mayor of Rochester*, Reg. Lib. A. fol. 271, cited in Shelford on Mortmain, 425); but *semble* not, where in an information and bill the relator is also the plaintiff (*Attorney-General* v. *Knight*, 3 My. & Cr. 154). In the last case the defendants appear to have proceeded by memorial to the Attorney-General, but in the two former cases by motion to the Court.

Right to security waived by demurrer, &c.,

As to a defendant waiving his right by taking voluntary steps in the suit after notice of the facts entitling him to security, see *Atkins* v. *Cook*, 3 Dr. 694. If he acts without such notice he does not lose his right, though he

might have discovered the facts by inquiry, *Swanzy* v. *Swanzy*, 4 K. & J. 257 ; see *Washoe Mining Company* v. *Ferguson*, 2 L. R. Eq. 371. Nor if the proceedings taken by him were forced on him, *e.g.*, by a motion for an injunction, *Murrow* v. *Wilson*, 12 Beav. 497, or for production of documents, *Cooper* v. *Purton*, 8 W. R. 702, nor where he demurs without prejudice to his right, *Drinan* v. *Mannix*, 3 Dr. & W. 155. As to the right, once waived, being recovered on plaintiff's amendment or revivor, see *Wyllie* v. *Ellice*, 11 Beav. 99 ; *Jackson* v. *Davenport*, 29 Beav. 212 ; and see Morgan & Davey on Costs, 13, 14.

unless put in without prejudice.

Rule 7. Costs of amendment of bill.

7. Where the plaintiff is directed to pay to the defendant the costs of the suit, the costs occasioned to a defendant by any amendment of the bill shall be deemed to be part of such defendant's costs in the cause (except as to any amendment which may have been made by special leave of the Court, or which shall appear to have been rendered necessary by the default of such defendant) ; but there shall be deducted from such costs any sum which may have been paid by the plaintiff, according to the course of the Court, at the time of any amendment (3rd April, 1828 ; Ord. 29).

Rule 8. Where amendment unnecessary.

8. Where, upon taxation, a plaintiff who has obtained a decree with costs is not allowed the costs of any *amendment* of the bill, upon the ground of its having been *unnecessarily made* (*j*), the defendant's costs, occasioned by such amendment, shall be taxed, and the amount thereof deducted from the costs to be paid by the defendant to the plaintiff (3rd April, 1828 ; Ord. 30).

(*j*) Special directions may be given to the taxing master to look into the pleadings and tax the costs occasioned by any unnecessary amendments, *Burchell* v. *Giles*, 11 Beav. 34 ; and see *Watts* v. *Manning*, 1 S. & S. 421 ; *Pledge* v. *Buss*, Johns. 663.

Where directions will be given under this rule.

Where important allegations contained in the original bill are struck out by amendment, the plaintiff will have to pay the additional costs occasioned by the amendment, *Strickland* v. *Strickland*, 3 Beav. 242 ; and see *Bowes* v. *Cooper*, 2 Hare, 408 ; *Mavor* v. *Dry*, 2 S. & S. 113. And *semble*, the proper time for asking for such costs, which ought to be the subject of a special application, is when the cause of complaint arises (*Mounsey* v. *Burnham*, 1 Hare, 22).

Time for applying for costs under this rule.

Rule 9. Costs of pleadings, &c., improper or of unnecessary length.

9. Where, upon the hearing of any cause, petition, or motion, the Court is of opinion that any *pleading, petition, or affidavit, or any part thereof, is improper or of unnecessary length* (*k*), there, unless the same has been referred for impertinence under the practice existing before the passing of the Stat. 15 & 16 Vict. c. 86 (*l*), the Court may either declare such pleading, petition, or affi-

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davit, or any part thereof, to be improper or of unnecessary length, or may direct the taxing master to look into such pleading, petition, or affidavit, and distinguish what part thereof is improper or of unnecessary length (*k*), and may direct the taxing master to ascertain the costs occasioned to any party by such part thereof as in the one case may have been declared to be, and in the other case may have been distinguished as being, improper, or of unnecessary length, and may make such order as is just for the payment, set-off, or other allowance of such costs (8th May, 1845 ; Ord. 122).

Taxing master's discretion as to improper pleadings.

(*k*) The Court will in general leave to the taxing master the province of distinguishing what parts are unnecessary.

Under the common order to tax, the taxing masters do not look into the pleadings, &c., to distinguish what parts are unnecessary, unless directed, *Re Farington*, 33 Beav. 347.

For form of direction see Seton, 91, 92; *Burchell* v. *Giles*, 11 Beav. 34 ; *Woods* v. *Woods*, 5 Hare, 229 ; *Re Bedminster Charities*, 12 Jur. 665 ; *Hanslip* v. *Kitton*, 8 Jur. N. S. 835.

See observations of Lord Romilly in *Moore* v. *Smith*, 14 Beav. 396, and *Burchell* v. *Giles*, l. c., and *Woods* v. *Woods*, 5 Hare, 229.

It seems the direction is itself an intimation, that the Court considers the affidavit, &c., of unnecessary length (*Re Skidmore*, 1 Jur. N. S. 696 ; see the observations in *Re Skidmore*).

Unnecessary length in petitions.

For instances of unnecessary *length in petitions*, *Re Manchester and Leeds Railway Company*, 8 Hare, 31 ; *Re Courtois' Will*, 10 Hare, App. lxiv. ; *Hyder* v. *Colman*, 21 L. J. Ch. 592 ; *Re Bedminster Charities*, l. c. ; *Re Wills*, 12 W. R. 97 ; *Canning* v. *Bell*, 13 L. J. Ch. 304 ; *Moore* v. *Smith*, 14 Beav. 396, and note (*c*), p. 48, *ante :* and in pleadings generally, see *Scottish Union Insurance Company* v. *Steele*, 9 L. T. N. S. 677 ; *Tench* v. *Cheese*, 1 Beav. 571 ; *Byde* v. *Masterman*, Cr. & Ph. 265 ; *Attorney-General* v. *Foster*, 2 Hare, 81 ; *Davis* v. *Cripps*, 2 Y. & C. C. C. 435 ; *Norway* v. *Rowe*, 1 Mer. 347.

(*l*) See as to impertinent matter, 15 & 16 Vict. c. 86, s. 17, p. 171, *ante*.

Rule 10. Disallowance of costs of unnecessary matter in proceeding's in judge's chambers.

10. Where it appears to the judge in chambers that any statement, *affidavit*, or other proceeding before him, contains impertinent or *unnecessary matter*, he may (without any application made to him for the purpose) disallow such matter, and the chief clerk shall distinguish by his initials in the margin the parts so disallowed, and shall state such disallowance in his report or certificate as to the particular inquiry on which such statement, affidavit, or other proceeding shall have been used before him ; and in the taxation of costs, no costs shall be allowed to the party by or on whose behalf such statement, affidavit, or other proceeding was brought into the judge's

chambers, for or in respect of the matter so disallowed; and the taxing master shall allow to the other parties to the suit or matter all such costs as have been incurred by or occasioned to them by reason of the matter so disallowed; and such costs shall be paid by the party by or on whose behalf such statement, affidavit, or other proceeding was so brought in (3rd June, 1850; Ord. 9).

Rule 11. Application for costs of impertinent matter to be made when costs of cause, &c., are disposed of.

11. The application to be made under the Stat. 15 & 16 Vict. c. 86, s. 17, for the costs of any impertinent matter introduced into any bill, answer, or other proceeding, shall be made at the time when the Court disposes of the costs of the cause or matter, and not at any other time (7th Aug. 1852; 1st Set, Ord. 30).

Rule 12. Separate answers, &c., by same solicitor.

12. Where the *same solicitor is employed for two or more defendants*, and separate answers are filed, or other proceedings had, by or for two or more such defendants separately, the taxing master shall consider, in the taxation of such solicitor's bill of costs, either between party and party, or between solicitor and client, whether such separate answers or other proceedings were necessary or proper; and if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred, the same shall be disallowed (*m*) (3rd April, 1828; Ord. 27).

(*m*) Where the same solicitor appeared for two defendants and set down a plea for each of them, he was allowed the costs of one only, *Tarbuck* v. *Woodcock*, 3 Beav. 289. One solicitor setting down two pleas.

Where the same solicitor appeared for the receiver and a party to the suit, he was only allowed to charge for one copy of the receiver's account, *Sharp* v. *Wright*, 1 L. R. Eq. 634; and where one solicitor attended in chambers for two parties in different interests, the costs of one attendance only were allowed, *Brown* v. *Gellatly*, 15 W. R. 887: but see note (*e*), p. 577, *ante*, *ad finem*. Taking two sets of copies. Attending for two parties.

The liability for costs *as between themselves*, of several plaintiffs or defendants employing the same solicitor, is discussed and the rules stated in *Re Colquhoun*, 5 D. M. G. 35.

As to the costs of parties who, though representing the same interest, employ different solicitors, and sever in their defence, see note (*e*) to p. 533, *ante*.

Rule 13. Costs of insufficiency where exceptions submitted to.

13. Where a defendant submits to exceptions for insufficiency, which have not been set down for hearing, he shall pay to the plaintiff twenty shillings costs (22nd May, 1661; Sand. 300). And where a plaintiff obtains a decree with costs, the costs occasioned to the plaintiff by

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the insufficiency of the answer of any defendant who shall have submitted to exceptions for insufficiency, shall be deemed to be part of the plaintiff's costs in the cause, such sum being deducted therefrom as shall have been paid by the defendant upon the exceptions to the said answer being submitted to (3rd April, 1828; Ord. 28) (*n*).

Costs of exceptions. Where rule applies.

(*n*) As to the costs of exceptions, see note (*a*), p. 455, *ante*.
This rule only applies supposing the question of such extra costs not to have been disposed of by the Court incidentally to any proceedings before it (*Poole* v. *Gordon*, 16 L. J. Ch. 265).

Rule 14. Costs of bill of discovery by defendant.

14. The costs of a bill of discovery filed by any defendant to a bill for relief shall be costs in the original cause, unless the Court shall otherwise direct (8th May, 1845; Ord. 125) (*o*).

Costs of cross bill

made costs in original cause,

though dismissed.

(*o*) Cross bills for discovery are now seldom filed, see sect. 19 of the Chancery Improvement Act, 1852, p. 177, *ante*, and notes.
As to what is and what is not a cross bill, see *Tynte* v. *Hodge*, cited p. 580, *ante*.
If a cross bill be filed *bonâ fide*, the costs of it will be costs in the original cause, though the discovery sought by it and obtained was not all made available, *Robinson* v. *Wall*, 10 Beav. 73.
If a plaintiff dismisses his bill before the hearing, such dismissal will, it is conceived, carry the costs of the cross cause also, though it was otherwise under the former practice, *Westfield* v. *Skipwith*, 1 Ph. 277.
See Morgan & Davey, 146, as to costs of evidence read in both causes.

Rule 15. Of appearance entered by plaintiff.

15. The plaintiff, having duly caused an appearance to be entered for any defendant, is entitled, as against the same defendant, to the costs of and incident to entering such appearance, whatever may be the event of the suit; and such costs shall be added to any costs which the plaintiff may be entitled to receive from such defendant, or be set off against any costs which he may be ordered to pay to such defendant; but payment thereof shall not be otherwise enforced without the leave of the Court (8th May, 1845; Ord. 35).

Rule 16. Costs of formal party required to appear, &c.

16. Where no account, payment, conveyance, or other relief is sought against a party, but the plaintiff requires such party to appear to or answer the bill, the costs occasioned by the plaintiff having required such party so to appear to or answer the bill, and the costs of all proceedings consequent thereon, shall be paid by the plain-

tiff, unless the Court shall otherwise direct (26th Aug. 1841; Ord. 29) (*p*). ORDER XL. Costs, Charges, and Expenses, generally.

(*p*) See *Abram* v. *Ward*, 6 Hare, 170, where defendants in the same interest as the plaintiffs, but who had refused to join as co-plaintiffs, were allowed their costs under this rule. Parties refusing to be co-plaintiffs.

17. Expenses incurred in consequence of *affidavits* being prepared or *settled by counsel*, shall be allowed only when the taxing master shall in his discretion, and on consideration of the special circumstances of each case, think such expenses properly incurred; and in such case he shall be at liberty to allow the same or such parts thereof as he may consider just and reasonable, whether the taxation be between solicitor and client or between party and party (1st June, 1854; Ord. 11) (*q*). Rule 17. Costs of affidavits prepared, &c., by counsel.

(*q*) See, before the rule, *Re Pender*, 10 Beav. 390: The rule does not take the question of the costs of settling affidavits out of the discretion of the Court, see *Davies* v. *Marshall*, 1 Dr. & Sm. 354; where the costs of fees to counsel for settling an affidavit, which was a mere echo of the bill, were allowed. The present practice seems to be in favour of allowing fees to counsel for settling affidavits in all cases of difficulty. In what cases allowed.

18. No costs shall be allowed, either as between party and party, or as between solicitor and client, for any written bill, or written copy of a bill filed under the Stat. 15 & 16 Vict. c. 86, s. 6, or for any written copy thereof served upon any defendant thereto, or for any written brief of such bill, unless the Court, in disposing of the costs of the cause, shall direct the allowance thereof (7th Aug. 1852; 1st Set, Ord. 2) (*r*). Rule 18. Costs of written bill.

(*r*) See notes to 15 & 16 Vict. c. 86, s. 6, p. 164, *ante*. 15 & 16 Vict. c. 86, s. 6.

19. The payment to be made by the defendant to the plaintiff for printed copies of the bill shall be at the rate of one halfpenny per folio (7th Aug. 1852; 1st Set, Ord. 5) (*s*). Rule 19. Payment for printed copies of bill.

(*s*) As to the length of the folio, see Regulations as to Fees, Appendix, p. xxxvi. *post*. Per folio.

20. Where *two counsel* (*t*) appear for the same party upon the hearing of any cause or matter, and it appears to the taxing master to have been necessary or proper Rule 20. Costs of two counsel.

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for such party to retain two counsel to appear, the costs occasioned thereby shall be allowed, although both of such counsel may have been selected from the outer bar (3rd April, 1828; Ord. 33) (*u*).

Costs of second counsel.

(*t*) As to the practice of allowing two counsel upon interlocutory motions, see observations of V.-C. Shadwell in *Cooke* v. *Turner*, 12 Sim. 650, and of Lord Langdale in *Stephens* v. *Lord Newborough*, 11 Beav. 403, where the briefs of two counsel were allowed on an unopposed motion on taxation as between party and party. So on an unopposed petition, *Sturge* v. *Dimsdale*, 9 Beav. 170. But of course there were special circumstances in those cases. See *Friend* v. *Solly*, 10 Beav. 329; *Yearsley* v. *Yearsley*, 19 Beav. 1.

The costs of two junior counsel employed to settle a defendant's answer will not be allowed (*Davis* v. *Earl of Dysart*, 21 Beav. 124; 8 D. M. G. 33); but under an order for taxation of costs as between *solicitor and client*, the costs of a consultation between the junior counsel and a Queen's Counsel as to the frame of a bill in equity were properly allowed, without reference to the result of the suit, or the fact whether or not the advice of the Queen's Counsel was acted upon (*Forster* v. *Davies*, 11 W. R. 813; see, too, *Lucas* v. *Peacock*, 8 Beav. 1).

Costs of third counsel.

(*u*) It does not follow from this rule that the costs of a third counsel (being a Queen's Counsel) will not be allowed where the question involved is intricate or the pleadings voluminous. Per V.-C. Shadwell in *Wastell* v. *Leslie*, 14 Sim. 84. But see *Smith* v. *Earl of Effingham*, 10 Beav. 378; *Attorney-General* v. *Munro*, 1 Mac. & G. 213; *Downing College Case*, 3 M. & C. 474. In a very heavy appeal case the costs of three counsel were allowed (*Pearce* v. *Lindsay*, Johns. 705 note; 1 D. F. J. 573; *Wentworth* v. *Lloyd*, 2 L. R. Eq. 607. See, as to employing a third counsel of the common law bar, *Betts* v. *Clifford*, 1 J. & H. 74, where the costs of such counsel were allowed; *Flockton* v. *Peake*, 12 W. R. 1203, where they were disallowed.

When the counsel who has drawn the pleadings is called within the bar before the hearing, the costs of employing two additional counsel may be allowed (*Carter* v. *Barnard*, 16 Sim. 157; see, however, *Green* v. *Briggs*, 7 Hare, 279).

Brief to Attorney-General.

As to the costs of a brief to the Attorney-General on an information, see *Attorney-General* v. *Drapers' Company*, 4 Beav. 305.

Rule 21. Costs of cause struck out for defect on part of plaintiff, and again set down.

21. Where a cause which stands for hearing is called on to be heard, but cannot be decided by reason of a want of parties or other defect on the part of the plaintiff, and is therefore struck out of the paper, and the same cause is again set down, the defendant shall be allowed the taxed costs occasioned by the first setting down, although he does not obtain the costs of the suit (3rd April, 1828; Ord. 34) (*w*).

(*w*) See as to this rule, Morgan & Davey, 63.

Where objection for want of parties is taken.

The objection for want of parties should have been taken by the answer, but the rule applies if the defect appears in the bill (*Furze* v. *Sharwood*, 5 M. & Cr. 96; *Lowry* v. *Fulton*, 9 Sim. 104; and *Attorney-General* v. *Hill*, 3 M. & Cr. 247, where the defendants did not insist on the objection at the hearing).

Costs of the day.

And where no answer was required, but the defendants took the objection by affidavit, the plaintiff was ordered to pay the costs of the day (*Nelson* v. *Seaman*, 1 D. F. J. 358).

But where the defendants by answer admitted that all proper persons were parties, they are not entitled to the costs of the day (*Price* v. *Berrington*, 2 Beav. 285; and see *Wilson* v. *Broughton*, 7 L. J. Ch. 120). *Mitchell* v. *Bailey*, 3 Madd. 61); and *semble*, the Court has power to reserve the costs notwithstanding the rule (*Mason* v. *Franklin*, 1 Y. & C. C. C. 242).

As to the costs of causes standing over by reason of the non-attendance of the plaintiff's or appellant's counsel, see *Godson* v. *Hall*, 7 Cl. & Fin. 549.

Costs where cause stands over by reason of non-attendance of counsel.

Rule 22. Costs of day.

22. Where a cause, being in the paper for hearing, is ordered to be adjourned upon payment of the costs of the day (*x*), the party to pay the same, whether before the Lord Chancellor, the Lords Justices, the Master of the Rolls, or one of the Vice-Chancellors, shall pay the sum of ten pounds, unless the Court shall otherwise direct (3rd April, 1828; Ord. 35) (*x*).

(*x*) See as to costs of day, *Caddick* v. *Cook*, 32 Beav. 70; and *Till* v. *Brown*, 2 Bro. C. C. 276; *Farmer* v. *Curtis*, 2 Sim. 466; Morgan & Davey, 64.

Rule *23. Costs of abandoned motion.

*23. Where a party gives a *notice of motion, and does not move* accordingly, he shall pay to the other side, *costs to be taxed* by the taxing master, unless the Court itself shall direct, upon production of the notice of motion, what sum shall be paid for costs (see Ord. of 5th Aug. 1818) (*y*).

(*y*) Under the old order forty shillings only was payable upon an abandoned motion unless an affidavit had been filed (*Green* v. *Meares*, 14 Sim. 526; *Gorely* v. *Gorely*, 25 Beav. 234, in which case taxed costs were payable). As to what motions were within the Order, see *Tucker* v. *Hernaman*, 24 L. J. Ch. 456; *Davis* v. *South-Eastern Railway Company*, 23 Beav. 549, in the reporter's note to which all the cases are collected.

Forty shillings formerly payable.

A motion is abandoned (*α*) if the plaintiff *amends his bill*, and gives a new notice of motion, *Eccles* v. *Liverpool Borough Bank*, Johns. 402; *London and Blackwall Railway Company* v. *Limehouse Board of Works*, 3 K. & J. 123; *Smith* v. *Dickson*, 12 W. R. 934; see note (*j*), p. 411, *ante*.

What is an abandoned motion.

(*β*) If counsel is not instructed to move on the seal day mentioned in the notice (*Re Compton Smith*, 23 Beav. 284, and see *Wedderburne* v. *Llewellyn*, 13 W. R. 939); and a motion before the Appeal Court will be treated as abandoned if not made when called upon (*Turner* v. *Turner*, 15 Jur. 1165). Where the motion is renewed it will not be heard till the costs of the abandoned motion have been paid (*Bellchamber* v. *Giani*, 550; and see *Oldfield* v. *Cobbett*, 12 Beav. 91, and note to 23 Beav. 550, *ibid.*).

When the party giving the notice of motion dies before it is brought on, and the bill is revived by his executors, who decline to proceed with the motion, the other side is not entitled to the costs of the motion, as costs of the abandoned motion or as costs in the cause (*Lewis* v. *Armstrong*, 3 M. & K. 69; *Warner* v. *Armstrong*, 4 Sim. 140).

Representatives reviving and not moving.

If a party applies for the costs under this rule he must mention the abandoned notice of motion to the Court, and produce it to the registrar before the order is drawn up (*Withey* v. *Haigh*, 3 Madd. 437).

How and when costs under rule to be applied for.

It is too late to ask for the costs of an abandoned motion at the hearing, at least on speaking to minutes (*Eccles* v. *Liverpool Borough Bank*, Johns. 402;

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and see *Woodcock* v. *Oxford, Worcester, and Wolverhampton Railway Company*, 17 Jur. 33, where it was held that such costs were to be applied for *on the seal day after the day on which the notice of motion was given.* See, too, *Farquharson* v. *Pitcher*, 4 Russ. 510, where it was held that after a bill has been dismissed for want of prosecution, the plaintiff cannot obtain the costs of an abandoned motion.

Rule *24. Costs of establishing a debt under decree.

*24. A creditor who has come in and established his debt (*z*) in the judge's *chambers*, under a decree or order in a suit, shall be entitled to the costs of so establishing his debt (*a*); and the sum to be allowed for such costs shall be fixed by the judge, unless he shall think fit to direct the taxation thereof; and the amount of such costs, or the sum allowed in respect thereof, shall be added to the debt so established (11th April, 1842; Ord. 6, amending 47th Ord. of 26th Aug. 1841).

Costs of creditor failing in claim.

(*z*) See note (*k*), p. 149, *ante*, as to the costs of a creditor *failing* in his claim.

Creditor plaintiff in cause not within rule.

(*a*) The rule does not apply to the costs of a creditor plaintiff in the cause (*Flintoff* v. *Haynes*, 4 Hare, 309; and see further as to the rule, *Read* v. *Smith*, 4 Beav. 521).

Where there is a deficiency of assets the costs of the creditors proving will not be payable in the first instance, but will have to be apportioned with their debts (*Morshead* v. *Reynolds*, 21 Beav. 638).

Rule 25. Taxation of costs under r. 24 by direction of a judge.

25. Where an account consists in part of any bill of costs, or where the judge is authorised to fix the amount of costs under the 24th Rule of this Order, the judge may direct the taxing master to assist him in settling such costs, not being the ordinary costs of passing the account of a receiver; and the taxing master, on receiving such direction, shall proceed to tax such costs, and shall have the same powers, and the same fees shall be payable in respect thereof, as if the same had been referred to the taxing master by an order, and he shall return the same, with his opinion thereon, to the judge by whose direction the same were taxed (26th Oct. 1842; Ord. 12).

Rule 26. Books, &c., to be transmitted by the judge's chief clerk to the taxing-master.

26. Where, upon the taxation of any bill of costs, it appears to the taxing master, that, for the purpose of duly taxing the same, it is necessary to inspect any books, papers, or documents relating to the cause or matter in the chambers of any judge, the taxing master

shall be at liberty to request the chief clerk of such judge to cause the same to be transmitted to the office of the taxing master; and also to request such chief clerk to certify any proceedings in the said chambers which may be comprised in the bill of costs under taxation; and in such cases the chief clerk, when and so soon and at and for such times as the due transaction of the business at the said chambers will permit, shall direct such books, papers, and documents to be transmitted to the office of the taxing master for his use during the taxation, and shall certify the proceedings which have taken place in the said chambers according to the request of the taxing master; and after the costs in respect of which such request of the taxing master was made shall have been certified, the taxing master shall cause the same books, papers, and documents which have been so transmitted to his office, if then remaining there, to be returned to the chambers of the judge (26th Oct. 1842; Ord. 13).

Rule 27. Memorandum of transmission, &c.

27. When any book, paper, or document shall be transmitted from the chambers of a judge to the office of a taxing master, a memorandum of such transmission shall be made and signed by the taxing master or the clerk of the taxing master at whose request such book, paper, or document may be transmitted, and shall be delivered to the chief clerk of such judge: and when any such book, paper, or document shall be returned from the office of the taxing master to the judge's chambers, a memorandum of such return shall be made and signed by such chief clerk, or by one of his clerks, and shall be delivered to the taxing master (26th Oct. 1842; Ord. 14).

Rule 28. Costs of parties attending chambers without leave of judge.

28. Parties attending any proceeding in chambers, without having obtained the previous leave of the judge to attend the same, shall not be allowed any costs of such attendance, unless by special order of the Court or judge (16th Oct. 1852; Ord. 55).

Rule 29. Costs of counsel attending chambers.

29. The costs of counsel attending the judge in chambers shall not in any case be allowed, unless the judge

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certifies it to be a proper case for counsel to attend (16th Oct. 1852; Ord. 56) (*b*).

(*b*) As to the practice of hearing counsel in chambers, see 15 & 16 Vict. c. 80, s. 28 (*ante*, p. 145).

Rule *30. Costs of drafts settled by private counsel before or after they are settled by conveyancing counsel of court.

*30. Where, in pursuance of any direction by the Court or a judge in chambers, drafts are settled by any of the conveyancing counsel of the court (*c*), the expense of procuring such drafts to be previously or subsequently settled by other counsel on behalf of the same parties on whose behalf such drafts are settled by the conveyancing counsel of the court, shall not be allowed on taxation as between party and party, or as between solicitor and client, unless the Court or the judge in chambers shall otherwise direct (see Letter by Lord St. Leonards, C., to the Taxing Masters, 24th Dec. 1852) (*d*).

(*c*) This rule is new. The costs of referring title, &c. to conveyancing counsel of the court are liable to taxation, see note (*e*) to rule 32, *infra*.

Fees to conveyancing counsel.

The fees payable to the conveyancing counsel are entirely in the discretion of the taxing master (*Rumsay* v. *Rumsay*, 21 Beav. 40).

(*d*) As to costs where a purchaser or mortgagee insists on employing private counsel in addition to the conveyancing counsel of the court, see *Re Morgan Jones' Settled Estate*, 6 W. R. 762; *Nicholson* v. *Jeyes*, 1 Sm. & Giff. App. xiii.

Rule 31. Costs occasioned by non-attendance of party where judge does not proceed ex parte.

31. Where a proceeding in chambers fails, by reason of the non-attendance of any party, and the judge does not think it expedient to proceed *ex parte*, the judge may order such an amount of costs (if any) as he shall think reasonable, to be paid to the party attending, by the absent party or by his solicitor personally (3rd April, 1828; Ord. 55. 3rd June, 1850; Ord. 7, 8).

Rule 32. Allowances on taxation as between party and party.

32. Where costs are to be taxed as between *party and party*, the taxing master may allow to the party entitled to receive such costs all such just and reasonable expenses as appear to have been properly incurred in

The service and execution of writs, and the service of orders, notices, petitions, warrants, and summonses (*e*).

Advising with counsel on the pleadings, evidence, and other proceedings in the cause (*f*);

Procuring counsel to settle and sign pleadings and

such petitions as may appear to be proper to have been settled by counsel (*g*);

Procuring consultations of counsel (*h*);

Procuring the attendance of counsel in judge's chambers, or in the master's offices, where the judge or master has certified the case to be proper for counsel to attend (*i*);

Procuring evidence by deposition or affidavit (*j*), and the attendance of witnesses; and

Supplying counsel with copies of, or extracts from, necessary documents (*k*).

But in allowing such costs, the taxing master shall not allow to such party any costs which do not appear to have been necessary or proper for the attainment of justice or for defending his rights, or which appear to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party (8th May, 1845; Ord. 120).

(*e*) Costs incurred in issuing process of contempt will not be allowed on taxation as between party and party unless specially applied for (*Attorney-General* v. *Carrington*, 6 Beav. 460); nor the costs of inrolling a decree, *Clark* v. *Malpas*, 31 Beav. 554. *Costs* of solicitors issuing process, &c.

(*f*) Fees to counsel are generally left to the taxing master's discretion, *Attorney-General* v. *Lord Carrington*, 6 Beav. 454; *Parkinson* v. *Hanbury*, 13 W. R. 1056; including the conveyancing counsel of the court, *Re Spooner*, 1 K. & J. 220; but see *Attorney-General* v. *Drapers' Company*, 4 Beav. 305; *Davis* v. *Earl Dysart*, 21 Beav. 124; 8 D. M. G. 33; *Sturgis* v. *More*, 33 L. T. 5; and see notes (*c*) and (*d*), last page. Employing counsel.

A special retaining fee was disallowed on taxation between party and party, *Smith* v. *Earl of Effingham*, 10 Beav. 378; *Green* v. *Briggs*, 7 Hare, 279; but see *contra*, *Nicholls* v. *Haslam*, 15 Sim. 49. Counsel's fees on a brief to fix a day for the hearing were allowed on taxation between party and party, *Clark* v. *Malpas*, 31 Beav. 554. Retaining fee.

The costs of drawing observations for counsel may be allowed, though the cause stand over, *Davies* v. *Marshall*, 1 Dr. & Sm. 564, unless they are unreasonably long, *Ernest* v. *Partridge*, 11 W. R. 715; see *Wentworth* v. *Lloyd*, 3 L. R. Eq. 608; *Friend* v. *Solly*, 10 Beav. 329; *Re Pender*, *ibid.* 390; *Stephens* v. *Lord Newborough*, *ibid.* 403. See Seton, 840, and note (*k*), *infra*. Drawing observations.

(*g*) See note (*q*) to rule 17, p. 585, *ante*.

(*h*) See rule 20, *supra*, and notes (*t*) and (*u*), p. 586.

In the absence of special reason only one consultation fee should be allowed on taxation as between party and party, *Smith* v. *Earl of Effingham*, 10 Beav. 378; and see *Davis* v. *Earl of Dysart*, 21 Beav. 124; 8 D. M. G. 33; *Lucas* v. *Peacock*, 8 Beav. 1; *Re Catlin*, 18 Beav. 516. Of consultations.

The costs of a conference as to a demurrer were allowed though the demurrer was unsuccessful, *Ernest* v. *Partridge*, 11 W. R. 715. Conferences.

See as to allowance of consultation fees on taxation between party and party, *Green* v. *Biggs*, 7 Hare, 279; *Forster* v. *Davies*, 32 Beav. 624.

(*i*) See rule 29, *supra*.

(*j*) As to costs of examining witnesses abroad, see *Wentworth* v. *Lloyd*, 34 Beav. 455; of unnecessary evidence, see *Attorney-General* v. *Carrington* (l. c.); Of examining witnesses

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Booth v. *Booth*, 1 Beav. 130; *Farrow* v. *Rees*, 4 Beav. 29. Of bringing up witnesses for cross-examination who were not cross-examined, *Clark* v. *Malpas*, 31 Beav. 554.

The costs of an affidavit, filed but not entered in the order, will not be allowed even on a taxation as between solicitor and client (*Stephens* v. *Lord Newborough*, 11 Beav. 403; and see *Stuart* v. *Greenall*, 13 Price, 755). But where a document is not filed, but it appears that the consequence of not filing it was to save expense, the costs of it will be allowed (*Davies* v. *Marshall* (No. 2), 1 Drew. & Sm. 564).

abroad, or unnecessarily.

Of affidavits, &c., not used.

A solicitor is entitled to the costs of an affidavit made on delivering up papers under an order (*Re Catlin*, 18 Beav. 514; see *Rawlinson* v. *Moss*, 9 W. R. 733).

As to costs of employing experts to get up evidence, see *Churton* v. *Frewin*, 15 W. R. 599.

As to costs of attorney's travelling expenses, see *Clark* v. *Malpas*, 4 Beav. 554; *Howell* v. *Tyler*, 2 Y. & C. 284.

Copying correspondence, &c.

(*k*) In *Friend* v. *Solly*, 10 Beav. 329, the briefs of pleadings prepared for counsel after publication, and before the cause had been set down, and which became useless in consequence of a compromise before hearing, were disallowed on taxation as between solicitor and client. See, too, *Re Pender*, 19 Beav. 390. In *Stephens* v. *Lord Newborough*, 11 Beav. 403, the costs of a copy of correspondence furnished to counsel as instructions for a bill and partially inserted therein, in addition to instructions for drawing the bill, were disallowed, though the taxation was as between solicitor and client.

Employing short-hand writer.

The costs of short-hand writer's notes of the evidence were disallowed in *Smith* v. *Earl of Effingham*, 10 Beav. 378; *Flockton* v. *Peake*, 12 W. R. 1023; but allowed in *Clark* v. *Malpas*, 31 Beav. 554; and see *Re London and Birmingham Railway Company*, 6 W. R. 141; *Malins* v. *Price*, 1 Ph. 590.

Interpreter.

The costs of an interpreter employed to prepare an answer were allowed, but not his hotel and travelling expenses, *Earl Shrewsbury* v. *Trappes*, 10 W. R. 663.

Abstracting depositions.

A reasonable sum was allowed to a solicitor for reading depositions taken abroad, *Wentworth* v. *Lloyd*, 2 L. R. Eq. 607.

The costs of taking depositions which became useless were disallowed, *Ridley* v. *Sutton*, 1 H. & C. 741; but see *Duke of Beaufort* v. *Lord Ashburnham*, 13 C. B. N. S. 598; and compare note (*j*), *ante*, and Seton, 840.

Rule 33. Objection to an allowance or disallowance by the taxing master how made.

33. Any party who may be dissatisfied with the allowance or disallowance by the taxing master, in any bill of costs taxed by him, of the whole or any part of any item or items, may, at any time before the certificate is signed, deliver to the other party interested therein, and carry in before the taxing master, an objection in writing to such allowance or disallowance, specifying therein, by a list in a short and concise form, the items or item or parts or part thereof objected to, and may thereupon apply to the taxing master for a warrant to review the taxation in respect of the same (1st June, 1854; Ord. 12).

Rule 34. Reviewal of taxation upon application for warrant to review or upon the return thereof.

34. Upon the application for such warrant, or upon the return thereof, the taxing master shall re-consider and review his taxation upon such objection, and he may, if he shall think fit, receive further evidence in respect

thereof; and if so required by either party, he shall state, either in his certificate of taxation or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto (1st June, 1854; Ord. 13).

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35. Any party who may be dissatisfied with the certificate of the taxing-master as to any item or part of an item which may have been objected to as aforesaid, may apply to the *judge by whom the order for taxation shall have been made; and such application shall be made by a summons at chambers* for an order to review the taxation as to the same *item or part of an item*, and *such judge* may thereupon make such order as to the judge shall seem just (*l*); but the certificate of the taxing-master shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid (1st June, 1854; Ord. 14) (*m*).

Rule 35. Reviewal of taxation on motion or petition.

(*l*) The words in italics are from Ord. 2nd Aug. 1864, which abrogated rules 35 and 36 of this order, and re-enacted them as they now stand in the text. As they stood before such alteration, applications to review taxation were made in court by motion or petition.

Rule varied by Ord II., Aug. 1864.

(*m*) For the questions of taxation which are left to the taxing-master's discretion, and as to which there can be therefore no reviewal, see notes to rule 32, *supra*.

No reviewal of items left to discretion,

The common law courts have decided that a retaxation will in no case be directed if the items alleged to be overcharged do not amount to forty shillings, *Newton* v. *Boodle*, 4 C. B. 359; and on an application to review, the amount must be stated, *Re Dearden*, 9 Exch. 210; and the items alleged to have been improperly allowed or disallowed must be specified, *Re Congreve*, 4 Beav. 87.

or under forty shillings,

The Court will not entertain an application to review matters referred to a chancery taxing-master by a common law master, *Re Lett*, 10 W. R. 6; and see *Re Sheffield Water Works Act*, 1 L. R. Exch. 54; *Borrodaile* v. *Nelson*, 14 C. B. 655; Seton, 838, 9.

or common law items.

The Court, on application to review, will determine questions which involve some principle, but not those relating to *quantum* only, *Re Catlin*, 18 Beav. 508; *Friend* v. *Solly*, 10 Beav. 529; *Re Congreve*, 4 Beav. 87; *Turner* v. *Turner*, 7 W. R. 573; *Re Hubbard*, 23 Beav. 481; *Att.-Gen.* v. *Lord Carrington*, 6 Beav. 454; *Alsop* v. *Lord Oxford*, 1 M. & K. 564. Thus, where there had been irregularity in the proceedings before the taxing-master, *Fenton* v. *Crickett*, 3 Madd. 496; or where costs had been wrongly omitted from taxation (*Greenwood* v. *Churchill*, 14 Beav. 160), or the master refused to allow any costs in respect of a particular proceeding (*Heming* v. *Leifchild*, 9 W. R. 174), the taxation was ordered to be reviewed.

What items the Court will consider on a review of taxation.

Question of principle.

Where the petitioner had not taken proper steps to satisfy the taxing-master, he had to pay the costs of an application to review, though successful, *Sturge* v. *Dimsdale*, 9 Beav. 170. Where the taxation was only ordered to be reviewed in part, no costs were given, *Re Catlin*, 18 Beav. 508. See, too, *Re Whalley*, 20 Beav. 578; *Re Colquhoun, ex parte Ford*, 1 Sm. & Giff. App. I. *Re London, Birmingham, and Bucks Railway Act*, 6 W. R. 141.

Costs of application to review taxation.

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Rule 36. Evidence on such motions or petitions.

36. Such *application* (*n*) shall be heard and determined upon the evidence which shall have been brought in before the taxing-master; and no further evidence shall be received upon the hearing thereof, unless the *judge* (*n*) shall otherwise direct (1st June, 1854; Ord. 15).

(*n*) See note (*l*) to last rule.

Rule 37. Gross sum in lieu of taxed costs.

37. Upon interlocutory applications, where the Court deems it proper to award costs to either party, the Court may by the order direct payment of a sum in gross in lieu of taxed costs, and direct by and to whom such sum in gross shall be paid (8th May, 1845; Ord. 123) (*o*).

When parties are poor.

(*o*) The Court will not, it seems, act under this rule "unless the parties are poor, and are anxious to put an end to the matter" (per V.-C. Wood in *The London and Blackwall Railway Company* v. *The Board of Works for the Limehouse District*, 26 L. J. Ch. 170).

Rule 38. Order for taxation when unnecessary.

38. Where a bill or petition is dismissed with costs, or a motion is refused with costs, or any costs are by any general or special order ordered or decreed to be paid, the taxing-master in rotation, or if there has been any former taxation of costs in the same cause or matter, then the taxing-master before whom such former taxation has taken place, may tax such costs without any order referring the same for taxation, unless the Court, upon the application of the party alleging himself to be aggrieved, prohibits the taxation of such costs; and the costs to be certified by the taxing-master shall be recoverable by *subpœna* (8th May, 1845; Ord. 124) (*p*).

Costs recoverable by subpœna.

(*p*) See note (*c*), p. 513, *ante*.

Subpœna for costs.

Service out of the jurisdiction of a subpœna for costs is irregular (*Hawkins* v. *Hall*, 1 Beav. 73; 4 M. & C. R. 280); but substituted service of the subpœna may be allowed, see note (*d*), p. 512, *ante*.

Rule 39. Taxation of costs where parties differ.

39. Where it is directed that costs shall be taxed in case the parties differ about the same, the party claiming the costs shall bring the bill of costs into the taxing-master's office, and give notice of his having so done to the other party; and at any time within eight days after such notice, such other party shall have liberty to inspect the same without fee, if he thinks fit. And at or

before the expiration of the eight days, or such further time as the taxing-master shall in his discretion allow, such other party shall either agree to pay the costs or signify his dissent therefrom, and shall thereupon be at liberty to tender a sum of money for the costs. But where he makes no such tender, or where the party claiming the costs refuses to accept the sum so tendered, the taxing-master shall proceed to tax the costs. And where the taxed costs shall not exceed the sum tendered, the costs of the taxation shall be borne by the party claiming the costs (Ord. of 23rd Nov. 1831 ; amending 76th Ord. of 3rd April, 1828).

Rule 40. Total amount of costs taxed to be stated.

40. Where any costs are by any decree or order directed to be taxed, and to be paid out of any money in court, the taxing-master in his certificate of taxation shall state the total amount of all such costs as taxed, without any direction for that purpose in such decree or order (22nd Aug. 1859 ; Ord. 13).

ORDER XLI.

PROCEEDINGS UNDER THE STATUTORY JURISDICTION OF THE COURT.

1. *Proceedings under the Trustee Relief Act*, 10 & 11 *Vict.* c. 96.

Rule 1. Affidavit of trustee.

1. Any trustee desiring to pay money to the account of, or transfer or deposit stock or securities into or in the name of, the Accountant-General, under the Stat. 10 & 11 Vict. c. 96, shall file an affidavit (*a*), entitled in the matter of the Act and in the matter of the trust, and setting forth,

Article (1). (1.) His own name and address.

Article (2). (2.) The place where he is to be served with any petition or any notice of any proceeding or order of the Court or of the judge in chambers, relating to the trust fund.

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Article (3). (3.) The amount of money, stock, or securities, which he proposes to pay or transfer into or deposit in court to the credit of the trust.

Article (4). (4.) A short description of the trust and of the instrument creating it.

Article (5). (5.) The names of the persons interested in or entitled to the fund, to the best of the knowledge and belief of the trustee.

Article (6). (6.) The submission of the trustee to answer all such inquiries relating to the application of the money, stock, or securities, paid in, transferred, or deposited, under the Act, as the Court or the judge in chambers may think proper to make or direct (10th June, 1848; Ord. 1).

(*a*) See, as to this affidavit, note (*d*), p. 66, *ante*.
A statement as to non-investment is sometimes inserted, see r. 3, *infra*.

Rule 2. Payment, &c., how directed and certified. 2. The Accountant-General, on production of an office copy of the affidavit, shall give the necessary directions for payment, transfer, or deposit, and place the money, stock, or securities to the account of the particular trust; and such payment, transfer, or deposit shall be certified in the usual manner (10th June, 1848; Ord. 2).

Rule 3. Statement as to non-investment. Investment where no such statement. 3. Where it is deemed *unnecessary to have the money* or the dividends or interest of stock or securities *invested* in the meantime, the affidavit shall further contain a statement to that effect. But where the affidavit contains no such statement, the Accountant-General shall be at liberty to invest, as soon as conveniently may be, the money in Bank Three Pounds per Cent. Annuities in the matter of the particular trust, or in cases of dividends or interest on stock or securities transferred, such dividends or interest in the like stock, and all accumulations of the dividends of the stock in which such money shall be invested, and of the dividends or interest on such stock or securities as aforesaid, from time to time in the like matter, without any special order made by the Court in that behalf, and without any formal request for that purpose. Provided always, that where at any time a request in writing, by or on behalf of any party claiming

to be entitled, that such investment be discontinued, is left with the Accountant-General, he shall be at liberty to cease making any further investment in the matter of the particular trust until the Court shall have made some order in that behalf (7th May, 1852).

Rule 4. Notice of payment, &c.

4. The trustee having made the payment, transfer or deposit, shall forthwith give notice thereof to the several persons named in his affidavit, as interested in or entitled to the fund (10th June, 1848 ; Ord. 3) (*b*).

(*b*) This notice is sometimes dispensed with, see note (*m*), p. 69, *ante*.

Rule 5. Application by petition or summons by whom made.

5. Such persons, or any of them, or the trustee (*c*), may apply by petition, or, in cases where the trust fund does not exceed 300*l*. cash or 300*l*. stock, by summons (*d*), as occasion may require, respecting the investment, payment out, or distribution of the fund, or of the dividends or interest thereof (10th June, 1848 ; Ord. 4).

(*c*) As to the proper persons to petition, see note (*q*), p. 72, *ante*.
(*d*) See note (*p*), p. 72, and (*a*), p. 544, *ante*.

Rule 6. Notice to trustee.

6. The trustee shall be served with notice of any application made to the Court or to the judge in chambers, respecting the fund or the dividends or interest thereof, by any person interested therein or entitled thereto (10th June, 1848 ; Ord. 5) (*e*).

Rule 7. Notice to cestui que trust.

7. The persons interested in or entitled to the fund shall be served with notice of any application made by the trustee to the Court or to the judge in chambers, respecting the fund in court or the interest or dividends thereof (10th June, 1848 ; Ord. 6) (*e*).

(*e*) See the cases on service under the Act, p. 73, *ante*.

Rule 8. Place for service.

8. No petition shall be set down to be heard, and no summons shall be sealed, until the petitioner or applicant has first named in his petition or summons a place where he may be served with any petition or summons or notice of any proceeding or order of the Court relating to the trust fund (10th June, 1848 ; Ord. 7).

Rule 9. Title of petitions, &c.

9. Petitions presented, summonses issued, and affidavits filed under the said Act, shall be entitled in the matter of

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the said Act (10 & 11 Vict. c. 96), and in the matter of the particular trust (10th June, 1848; Ord. 8).

II. *Proceedings under the Statute* 16 & 17 *Vict. c.* 137, *s.* 28, *relating to Charitable Trusts* (*f*).

Rule 10. Application by summons. Form of summons.

10. Any application to a judge in chambers under "The Charitable Trusts Act, 1853," section twenty-eight, shall be made by summons, and such summons may be in the form set out in Schedule (K.) No. 1 (*g*), or as near thereto as the nature of the case may permit (9th Dec. 1853).

Charitable trusts. Jurisdiction of equity judges; of bankruptcy and county courts; of charity commissioners.

(*f*) This section of the Charitable Trusts Act, 1853, gives the equity judges *in chambers* power to appoint new trustees of, or grant other relief relating to any charity whose income *exceeds* 30*l.*, but the former jurisdiction to appoint new trustees, on petition, under the Trustee Act, is not taken away, though it is seldom used, see note (*o*), p. 98, *ante*.

The district Courts of Bankruptcy and County Courts were given similar jurisdiction over charities with an income under 30*l.*, and now, by the Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), over charities with an income up to 50*l.*

By the Act of 1860, sect. 2, a concurrent jurisdiction over charities is given to the Charity Commissioners, as to charities with an income exceeding 50*l.*, on the application of the majority of the trustees, and as to charities with a less income, on the application of the Attorney-General, the trustees, or any person interested in the charity, or inhabiting the place where it is situate, unless they think the case *from some difficulty of law or fact, fitter for the adjudication of a court*, see Seton, 789, note (*o*), p. 98, *ante*.

As to applications for new trustees of charities, see note (*o*), p. 98, *ante*.

(*g*) See Appendix, page xxi., *post*.

Rule 11. Fees on proceedings in chambers.

11. The fees payable on proceedings before a judge in chambers under the said Act shall be the same as the fees payable according to the Orders XXXVIII. and XXXIX., in respect of other proceedings commencing by summons, and shall also, in all other respects, be regulated by those Orders (9th Dec. 1853).

Rule 12. Fees and costs on summons.

12. Where the judge directs that any matter commenced by summons under the said Act shall be heard in open court, the same fees shall be payable and the same costs shall be allowed, as would have been payable in respect of any other matter so heard (9th Dec. 1853).

Rule 13. Appeal.

13. No order made under the said Act by the judge in chambers, shall be subject to appeal, where the gross annual income of the charity has not been declared by the Charity Commissioners for England and Wales to

exceed one hundred pounds, unless the judge by whom such order may have been made shall certify that such appeal ought to be permitted, either absolutely or on such terms as the judge may think fit to impose (9th Dec. 1853).

ORDER XLI. Proceedings under the Statutory Jurisdiction of the Court.

III. *Proceedings under the Statute* 19 & 20 *Vict. c.* 120, *relating to Leases and Sales of Settled Estates* (*h*).

14. Every petition under the Act, and every public and private notice required by the Act, shall set forth the name, address, and description of the petitioner, and also a place in London, Westminster, or the borough of Southwark, or within two miles from the Record and Writ Clerks' Office, where he may be served with any order of the Court or of the judge in chambers, or notice relating to the subject of the petition (15th Nov. 1856; Ord. 1).

Rule 14. Name, &c., of and place for service on petitioner.

(*h*) See note (*x*) to sect. 16 of the Act, p. 244, *ante*.

15. All petitions and notices, and also all affidavits and other proceedings under the Act, shall be entitled in the matter of the Act, and in the matter of the property in question, mentioning the county and parish or place in which it is situate, and describing it by general terms (*i*); and every such petition shall be marked with the words "Master of the Rolls," or with the title of the Vice-Chancellor before whom it is intended to be heard (15th Nov. 1856; Ord. 2).

Rule 15. Title of petitions, &c., under the Act.

(*i*) The particular settlement need not be specified, if the property is sufficiently identified, and shown to be under settlement (*Re Thompson's Settled Estates*, Johns. 418.

Title of petition, &c.

16. After any such petition has been presented, application may be made *ex parte* and in chambers to the judge before whom it is intended to be heard, for directions in what *newspapers* the notices required by the Act are to be inserted (15th Nov. 1856; Ord. 3) (*k*).

Rule 16. Advertisements.

(*k*) See note (*e*) to sect. 20 of the Act, p. 246, *ante*.

The advertisements should correspond exactly with the title of the petition, *Re Bateman's Settled Estates*, 13 W. R. 513; but a slight error was disregarded in *Re Nunes' Settled Estates*, 2 W. N. (1867), 109.

Form of advertisements.

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See as to advertisements being inserted for successive weeks, *Re Monkton Farleigh Estate*, A. N. R. 221.

But where a leasing power had been granted to a tenant for life who died, and a petition was presented by the succeeding tenant for life and her husband, praying that the power might vest in one of the trustees of the will under which she claimed, it was held, under the circumstances, that the advertisements need not be repeated (*Re Kentish Town Estate*, 1 J. & H. 230); and see *Re Bunbury's Settled Estates*, 13 W. R. 370; *Re Horton's Settled Estate*, 34 Beav. 386, where an infant remotely interested was born after advertisements had been issued, and the Court allowed him to be made a party by amendment, and dispensed with further advertisements.

Repeating advertisements.

Rule 17. Time for motions under s. 20.

17. Motions under the 20th section of the Act may be made *ex parte*, within seven clear days after the publication of the advertisement which may be last inserted in the newspaper, but not later, except by special leave of the Court (*l*); and every order made on any such motion must be served on the petitioner within four days after the making thereof (15th Nov. 1856; Ord. 4) (*m*).

Service of order thereon.

(*l*) See p. 246, *ante*, and *Re Merry's Settled Estates*, 14 W. R. 665.

(*m*) In bespeaking the order, the newspapers containing the advertisements and any interlocutory orders which may have been made relating thereto, must be left with the Registrar (33rd Regul. as to business, March, 1860, Appendix p. lxxxv., *post*).

Motions for leave to appear in support or opposition.

Rule 18. Application for copy of petition how made.

18. If the person obtaining such order shall require a copy of the petition, such person shall, at the time of serving such order, make a written application to the petitioner for such copy, with an undertaking to pay all proper charges for the same (15th Nov. 1856; Ord. 5).

Rule 19. Delivery and payment of copy.

19. Within two clear days after such application, a copy of the petition shall be ready to be delivered, and shall be delivered on demand, and on payment for the same, after the rate of fourpence per folio (15th Nov. 1856; Ord. 6).

Rule 20. Petition when heard.

20. No petition under the Act shall be set down for hearing until after the expiration of twenty-one days from the publication of the last of the advertisements (15th Nov. 1856; Ord. 7) (*n*).

When speeded.

(*n*) See note (*x*), p. 244, *ante*, and *Re Blake's Settled Estates*, 8 W. R. 539. In *Re Mallin's Settled Estates*, 3 Gif. 126, an application to set down the petition before the twenty-one days had elapsed was refused by the Lord Chancellor; but where the petition would otherwise have been thrown over the long vacation, a similar application was granted, *Re Adam*, 6 L. T. N. S. 604.

Rule 21. Court must be satisfied that no previous ap-

21. Upon every application under the Act, the Court must be satisfied by sufficient evidence that no such previous application to Parliament as is mentioned in the

21st section of the Act has been made and rejected, or reported against (15th Nov. 1856, Ord. 8) (*o*).

(*o*) See note (*g*), p. 246, *ante*.

plication to Parliament has been made.

22. On every application under the Act for authority to sell, the Court must be satisfied by sufficient evidence who are the parties interested in the estate, whose consent is required by the Act, and what are the circumstances which render the proposed sale proper and expedient (15th Nov. 1856; Ord. 9) (*p*).

Rule 22. Evidence of parties interested, and propriety of sale.

(*p*) See note (*z*), p. 245, *ante*.

23. Where, under the provisions of the 36th section of the Act, it shall be necessary to obtain the special directions of the Court for any application to the Court, or any consent to such application, such special directions may be obtained *ex parte* by summons at the chambers of the judge to whose court the application may be intended to be made or may have been made (15th Nov. 1856; Ord. 10) (*q*).

Rule 23. Special directions under s. 36, obtained by summons ex parte.

(*q*) This section relates to applications where infants, &c., are concerned, p. 252, *ante*. See the 21st and 22nd Regul. as to business, Aug. 1857, Appendix, p. lvi., *post*, as to the mode in which the application is made.

24. Every order of the Court made in pursuance of the powers conferred on it by the Act, shall specify on what document or documents (if any) the notice referred to by the 22nd section of the Act shall be placed or indorsed (*r*); and the judge may, if he thinks fit, require that such document or documents so indorsed shall be produced in court for his inspection; and in case of any such order relating to lands in a register county or district, the Court may order a duplicate or a memorial of the same to be registered (15th Nov. 1856; Ord. 11).

Rule 24. Documents on which notice under s. 22 is indorsed to be specified in order.

(*r*) See note (*h*) p. 246, *ante*.

25. The fees and allowances to all officers and solicitors of the Court in respect of the matters under the Act, shall be such fees and allowances as by the practice of the Court, and Orders XXXVIII. and XXXIX., they are entitled to take and charge for business of a similar nature (15th Nov. 1856; Ord. 12).

Rule 25. Fees and allowances to officers and solicitors.

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IV. *Proceedings under the Statute* 21 & 22 *Vict. c.* 27, *relating to the Amendment of the Procedure in the Court of Chancery* (*s*).

Rule 26. Question to be reduced into written form, copied, filed and entered for trial.

26. Any question of fact, or any question as to the amount of damages, which shall in any suit or proceeding be directed by any order to be tried by a jury before the Court itself, or before the Court itself without a jury, shall be reduced into writing in the form set forth in Schedule (N.), No. 1 or 2 (*t*), and the same shall be copied on parchment by the plaintiff or such person as the Court shall direct, or by the solicitor for such plaintiff or person, and shall be called the "record for trial;" and the same shall be filed with the Clerk of Records and Writs in whose division such suit or proceeding may be, within three days after such order shall have been passed and entered; and within three days after such filing as aforesaid, the same shall be entered for trial as hereinafter mentioned (4th April, 1859; Ord. 3).

(*s*) See the Act itself, p. 261, *ante*.
(*t*) See Appendix, p. xxv., *post*.

Rule 27. Special jury.

27. Where the Court shall order such question or questions to be tried by a special jury, a direction to that effect shall be contained in the order directing such trial (4th April, 1859; Ord. 4).

Rule 28. Setting down and marking of record for trial.

28. Upon production to the registrar of a certificate of the Clerk of Records and Writs that the "record for trial" has been filed, the same shall be set down for trial in the cause-book of the judge to whose court the suit or proceeding is attached, and shall be marked "trial by jury," or "trial before the Court without a jury," as the case may be; and either party may apply to the Court to fix a day for such trial (4th April, 1859; Ord. 5).

Day for trial.

Rule 29. Order for common jury.

Form.

29. Where such trial is to take place by a common jury before the Court itself, the plaintiff or such person as aforesaid, ten days at the least before the day fixed for such trial, shall obtain, on motion or petition as of course, and serve on the sheriff, or, if he is interested in the matter in question, then upon the coroner, an order for

such sheriff or coroner to summon a common jury for such trial, which order shall be in the form set forth in Schedule (N.), No. 3 (4th April, 1859; Ord. 6) (*u*).

(*u*) See Appendix, p. xxvi., *post*.

Rule 30. Order for special jury, where directed by Court.

30. Where the Court shall have specially directed such question or questions to be tried by a special jury, the plaintiff, or such other person as aforesaid, shall, ten days at the least before the day fixed for such trial, obtain on motion or petition as of course, and serve on the sheriff or coroner as aforesaid, and on the opposite party, an order for a special jury, which order shall be in the form set forth in Schedule (N.), No. 4 (*v*); and the expense of such special jury shall in the first instance be borne and paid by the plaintiff or such other person as aforesaid, but shall afterwards be paid and borne as the Court shall direct (4th April, 1859; Ord. 7.)

Costs.

(*v*) See Appendix, p. xxvii., *post*.

Rule 31. Order for a special jury, where not directed by Court.

31. Where the Court shall not have specially directed such question or questions to be tried by a special jury, either party shall be at liberty, fourteen days at the least before the day fixed for such trial, to obtain, on motion or petition of course, an order for a special jury, and shall serve the same on the opposite party twelve days at the least, and on the sheriff or coroner ten days at the least, before the day fixed for such trial; and the expense of such special jury shall in the first instance be borne by the party obtaining the same; but if the Court upon such trial shall be of opinion that it was proper that such trial should be had by a special jury, the Court may give such directions as to the costs thereof as it shall think fit (4th April, 1859; Ord. 8).

Costs.

Rule 32. Common jury to be summoned in addition to special jury.

32. Where an order shall have been made for a special jury, such sheriff or coroner shall, in addition to the special jury, summon twelve common jurymen for such trial, in order that, in the event of a sufficient number of special jurors not being in attendance to make a jury, a tales may be directed by the Court or prayed for by either party, as hereinafter provided (4th April, 1859; Ord. 9).

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Rule 33. Return, &c., of order and jury panel.

33. The order for any such common or special jury as aforesaid shall be returned by such sheriff or coroner to the solicitor or person who shall have lodged the same, together with his return and the jury panel; and such order and jury panel shall, two days at the least before the day of trial, be left with the Clerk of Records and Writs to be annexed to the record for trial (4th April, 1859; Ord. 10).

Rule 34. Making up special jury where directed by the Court.

34. Where the trial shall have been specially directed by the Court to be by a special jury, then in the event of there not being a sufficient number of special jurymen in attendance to make such jury, it shall be in the discretion of the Court whether or not to have such jury made up from the common jurymen in attendance (4th April, 1859; Ord. 11).

Rule 35. Making up special jury where not directed by Court.

35. Where a special jury shall have been summoned at the instance of either party, without the special direction of the Court, then in the event of a sufficient number of special jurymen not being in attendance to make such jury, the same shall, unless the Court shall otherwise direct, be made up from the common jurymen in attendance, on the application of either party (4th April, 1859; Ord. 12).

Rule 36. Summons for a view. Form of order.

36. Either party shall be at liberty to apply by summons to a judge at chambers for a view by the jury summoned for any trial; and on the hearing of such summons each party shall name a shower for such view, and any order to be made on such application (*w*) shall be in the form set forth in Schedule (N.), No. 5 (4th April, 1859; Ord. 13).

(*w*) See Appendix, p. xxvii., *post*.

Rule 37. Summons and order to state place of view, &c. Deposit.

37. The summons for a view, and the order to be made thereon, shall state the place at which the view is to be made and the distance thereof from the office of the under-sheriff. And the sum to be deposited in the hands of the under-sheriff shall be 10*l*. in case of a common jury, and 16*l*. in case of a special jury, if such distance shall not exceed five miles, and 15*l*. in case of a common jury, and 21*l*. in case of a special jury, if it shall

be above five miles; and if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the solicitor or party who obtained the view; and if such sum shall not be sufficient to pay such expenses, the deficiency shall forthwith be paid by such solicitor or party to the under-sheriff. And the under-sheriff shall pay and account for the money so deposited according to the scale following, that is to say:

Scale of charges.

For travelling expenses to the under-sheriff, showers, and jurymen, expenses already paid, if reasonable.			
Fee to the under-sheriff where the distance does not exceed five miles from his office .	1	1	0
Where such distance exceeds five miles . .	2	2	0
And in case he shall be necessarily absent more than one day, then for each day after the first, a further fee of	1	1	0
Fee to each of the showers, the same as the under-sheriff, calculating the distance from their respective places of abode.			
Fee to common juryman, per diem . . .	0	5	0
For each special juryman, per diem . .	1	1	0
Allowance for refreshment to the under-sheriff, showers, and jurymen, whether common or special, each per diem	0	5	0
To the bailiff, for summoning each juryman whose residence shall not be more than five miles distant from the office of the under-sheriff	0	2	6
And to the bailiff, for summoning each juryman whose residence does exceed five miles of such distance	0	5	0

(4th April, 1859; Ord. 14).

Rule 38. Nominating, &c., of special jury, and proceedings after order for a

38. The mode and practice of proceeding to nominate and reduce a special jury, and the proceedings after any order for a view shall have been made as aforesaid, shall be the same in all respects as are now or for the time

ORDER XLI. Proceedings under the Statutory Jurisdiction of the Court.

being shall be in force in the superior courts of common law, when a special jury is ordered to be struck or a view is to be had, or as near thereto as the practice of this court will admit (4th April, 1859; Ord. 15).

view to be same as at common law.

Rule 39. Form of notice to admit documents.

39. The notice to admit documents may be according to the form set forth in Schedule (N.) No. 6 (*x*) (4th April, 1859; Ord. 16).

(*x*) See Appendix, p. xxviii., *post*.

Rule 40. Payment of money into court in respect of damages.

40. Where the Court shall award damages, and direct a trial as to the amount of such damages before the Court itself, either with or without a jury, or direct a writ of inquiry of damages as hereinafter provided for, or an inquiry as to the amount of damages in any other manner, the defendant or other the person against whom damages shall have been awarded may take out a summons before a judge at chambers for liberty to pay into court a sum of money in respect of such damages; and in case such liberty shall be given and a sum of money shall be paid into court accordingly, then in the event of a larger sum for damages not being awarded than the amount so paid into court, the plaintiff, or person seeking such damages, shall pay the costs of such trial or writ of inquiry or inquiry in any such other manner as aforesaid, unless the Court shall otherwise direct (4th April, 1859; Ord. 17).

Rule 41. Record, &c., to be transmitted to registrar.

Copy to be left for judge.

41. On the day appointed for any trial and previously to the commencement thereof, the record for trial, with the return and jury panel (if any) annexed thereto, shall be transmitted by the Clerk of Records and Writs to the registrar of the court in attendance; and a copy thereof shall be left for the judge before whom such trial is appointed to be had, by the person at whose instance the same may have been entered for trial (4th April, 1859; Ord. 18).

Rule 42. Calling and swearing of jurors.

Swearing &c., of witnesses.

42. The jurors shall be called by the registrar of the court, and the oath shall be administered to them by such registrar, and shall be in the form set forth in Schedule (N.), No. 7 (*y*). The witnesses shall be called by the usher of the court; and the oath (or declaration, as the case

may be) shall be administered by the registrar of the court to the witnesses, and shall be in the form set forth in the same Schedule, No. 8 or 9 (4th April, 1859; Ord. 19).

(*y*) See Appendix, p. xxix., *post*.

Rule 43. Addresses of counsel.

43. Upon every such trial the addresses to the jury or to the Court, as the case may be, shall be regulated as follows:—The party who begins, or his counsel, shall be allowed, in the event of his opponent not announcing at the close of the case of the party who begins, his intention to adduce evidence, to address the jury a second time at the close of such case, for the purpose of summing up the evidence; and the party on the other side, or his counsel, shall be allowed to open the case, and also to sum up the evidence (if any); and the right to reply shall be the same as at present in force in the superior courts of common law on trials at Nisi Prius (4h April, 1859; Ord. 20).

Rule 44. Usher.

44. Where the jury retire from the court to consider their verdict, they shall be taken charge of by the usher of the court; but previously thereto the registrar of the court shall administer to such usher an oath according to the form set forth in Schedule (N.), No. 10 (*z*) (4th April, 1859; Ord. 21).

(*z*) See Appendix, p. xxix., *post*.

Rule 45. Indorsement and signature of verdict. Return of record, &c.

45. The verdict or finding of the jury, or of the Court, as the case may be, shall be indorsed by the registrar of the court on the record for trial, and shall be signed by him, and then returned to the office of the Clerks of Records and Writs to be filed, and if the trial shall have been by a jury, then with the jury panel and the names of the jurors who were sworn indorsed thereon (4th April, 1859; Ord. 22).

Rule 46. Application for new trial.

46. The notice of any application for a *new trial* (*x*), whether to the judge before whom such trial shall have been had, or to the Lord Chancellor or the Lords Justices shall be given for the times following:—If such trial shall have been had in Hilary, Trinity, or Michaelmas Term, then not later than for the 3rd seal after such

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term; and if such trial shall have been had in Easter Term, or during the sittings after Hilary, Trinity, or Michaelmas Term, then not later than for the 3rd motion day in the term then next ensuing (4th April, 1859; Ord. 23).

Inrolment of decree does not prevent new trial of issue. New trial after two years.

(*a*) If one party inrols a decree founded on a verdict as to issues, before the time for a new trial of the issues expires, the other party is not thereby prevented from moving for a new trial, *Fernie* v. *Young*, 1 L. R. Eng. & Ir. Ap. 64, 85.

Under special circumstances a defendant was allowed to move for a new trial though upwards of two years had elapsed since the trial of the issues in the case, *Betts* v. *De Vitre*, 15 W. R. 701.

Rule 47. Form of writ of inquiry of damages.

47. Where the Court shall award damages to any person, by virtue of the powers contained in the 2nd section of the said Act, and shall order the amount of such damages to be assessed by a jury before any judge of one of the superior courts of common law at Nisi Prius, or at the assizes, or before the sheriff of any county or city, the person to whom such damages shall be awarded shall be at liberty to sue out at the office of the Clerks of Records and Writs a writ of inquiry of damages, according to the form set forth in Schedule (N.), No. 11, 12, or 14 (*b*) (4th April, 1859; Ord. 24).

(*b*) See Appendix, p. xxx., *post*.

Rule 48. Notices of inquiry under writ.

48. The rules now in force in the courts of common law relative to notices of inquiry shall be applicable to notices of inquiry under any writ of inquiry to be issued by virtue of the last preceding Rule (4th April, 1859; Ord. 25).

Rule 49. Form of return to writ of inquiry.

49. The return to the writ of inquiry of the verdict or inquisition shall be in the form set forth in Schedule (N.); No. 13 (*c*); and the writ of inquiry, with such return thereto, shall, within ten days after such return, be filed at the office of the Clerks of Records and Writs (4th April, 1859; Ord. 26).

(*c*) See Appendix, p. xxxi., *post*.

Rule 50. Time for application to set aside ver-

50. Any application to set aside the verdict or inquisition on any such writ of inquiry, and to direct a new inquiry, shall be made within ten days after the filing

thereof, exclusive of any days on which the Court to which such application ought to be made shall not be sitting (4th April, 1859; Ord. 27).

ORDER XLI. Proceedings under the Statutory Jurisdiction of the Court.

51. Either party shall be at liberty to sue out, at the Record and Writ Clerks' Office, *subpœnas ad testificandum*, and *subpœnas duces tecum*, to compel the attendance of witnesses on any trial, according to the forms now, or which for the time being shall be, in use in this Court, or as near thereto as the circumstances of each case will admit (4th April, 1859; Ord. 28).

dict or inquisition on writ of inquiry.

Rule 51. Subpœnas ad testificandum and duces tecum.

52. The forms of proceedings contained in Schedule (N.), may be used in the cases to which they are applicable, with such alterations as the circumstances of the case may render necessary; and any variance therefrom, not being a matter of substance, shall not affect their validity or regularity (4th April, 1859; Ord. 29).

Rule 52. Forms how used or varied.

ORDER XLII.

ORDER XLII. Miscellaneous Points.

Miscellaneous Points.

I. *Contempt* (*a*).

1. Officers and attendants upon the court, suitors, and witnesses, are to have privilege (*b*) *eundo, redeundo, et morando*, for their necessary attendance, but not otherwise, and where any of them are arrested at such times of necessary attendance, it is a contempt of Court (29th Jan. 1618-19; Ord. 86).

Rule 1. Arrest of officers of court a contempt.

(*a*) For form of order to commit for contempt, see *Ex parte Van Sandau*, 1 Phil. 605.

A defendant in contempt may take any step necessary for his *defence*, *Fry* v. *Ernest*, 12 W. R. 97. Thus, he may be heard to show that proceedings subsequent to the order placing him in contempt were irregular (*Morrison* v. *Morrison*, 4 Hare, 590; *King* v. *Bryant*, 3 M. & Cr. 191; and see *Wilson* v. *Bates*, *id.* 197; *Hawkins* v. *Hall*, 1 Beav. 73; 4 M. & Cr. 280). Or he may apply for taxation of a bill of costs (*Newton* v. *Ricketts*, 11 Beav. 67), or except to a bill for scandal (*Everett* v. *Prythargch*, 12 Sim. 363), but he cannot apply for enlargement of time to answer, &c. (see note to Ord. XXXVII. 6, *ante*); nor move to dismiss for want of prosecution, *ante*, p. 536, head (3).

Party in contempt may take *defensive* proceedings.

A party in contempt should generally apply by *petition*, *Nicholson* v. *Squire*, 16 Ves. 259; but a plaintiff in contempt was, in *Futvoye* v. *Kennard*, 2 Gif.

ORDER XLII. Miscellaneous Points.

110, held entitled to be heard on a *motion* to discharge an order made against him at chambers.

A contempt may be waived, *e. g.* if a defendant is in contempt for want of sufficient answer, the plaintiff, by taking a step in the cause, *e. g.* by amending his bill without special leave (see p. 411, *ante*), or by giving notice of motion for decree, or by otherwise accepting an answer (see Daniell, 468) waives the contempt, and cannot claim the costs of it. But taking an office copy of an answer previously to the order requiring answers to be printed, was no waiver (*Anon.*, 15 Ves. 174), unless it was retained till the time for excepting expired, *Herritt* v. *Reynolds*, 2 Giff. 409.

Waiver of contempt.

(*b*) The privilege extends to a solicitor proceeding to attend an appointment with a person for whom he is acting in a suit (*Eyre* v. *Barrow*, 6 W. R. 767); or on his way to attend a summons at judge's chambers (*Re Jewitt*, 33 Beav. 559; and see *Attorney-General* v. *Leathersellers' Company*, 7 Beav. 157; *Gibbs* v. *Phillipson*, 1 R. & M. 19; *Plomer* v. *Macdonough*, 1 De G. & S. 232; *Andrewes* v. *Walton*, 1 M. & Gord. 380, and the other cases cited in Seton, 1238).

Extent of solicitor's privilege.

Rule 2. Violent language, &c., a contempt.

2. Any one who uses violence or abusive language to a person serving the process or orders of the Court, or uses scandalous or contemptuous words (*c*) against the Court or the process thereof, shall be liable to be committed upon motion, or notice to the person so offending (22nd May, 1661; Sand. 308. 29th Jan. 1618-19; Ord. 77).

Special contempt.

(*c*) As to publication by a newspaper of evidence in a cause with comments, before the hearing, being a contempt of court, see *Tichborne* v. *Tichborne*, 15 W. R. 1072, and cases there cited.

II. *Documents.*

Rule 3. Documents where deposited.

3. Where any deeds or other documents are ordered to be left or deposited, whether for safe custody or for the purpose of any inquiry in chambers or otherwise, the same shall be left or deposited in the Record and Writ Clerks' Office, and shall be subject to such directions as may be given for the production thereof (16th Oct. 1852; Ord. 57 (*d*)).

(*d*) See note (*o*), p. 172, *ante*.

Rule 4. Production of documents after hearing.

4. The course of procedure in use as to the production of documents ordered to be produced before the hearing of a cause, shall extend and be applied to the production of documents ordered to be produced after the hearing of any cause or matter (1st June, 1854; Ord. 3) (*e*).

(*e*) See note (*l*), p. 172, *ante*.

III. *Election.*

Rule 5. Where defendant's answer is not excepted to or set down for hearing on former exceptions.

5. A defendant, whose answer is not excepted to or set down for hearing on former exceptions, alleging that the plaintiff is prosecuting him in this court and also at law for the same matter, may, upon the expiration of eight days after his answer or further answer is filed, obtain as of course, on motion or petition, the usual order for the plaintiff to make his election in which court he will proceed (2nd Nov. 1850; Ord. 7) (*f*).

Plaintiff may not proceed at law and in equity,

(*f*) See as to proceedings in law and equity at the same time, *Boyd* v. *Heinzelman*, 1 V. & B. 381; *Hole* v. *Pearse*, 5 Hare, 408; *Williams* v. *Roberts*, 8 Hare, 315; and as to putting in an equitable plea to an action, and at the same time filing a bill for an injunction, see note (*d*), p. 223, *ante*; and generally as to restraining a plaintiff where he proceeds in law and equity at the same time, see *Wedderburn* v. *Wedderburn*, 2 Beav. 208.

A party cannot at the same time file a bill for specific performance and bring an action for use and occupation (*Carrick* v. *Young*, 4 Madd. 437; *Ambrose* v. *Nott*, 2 Hare, 649), or for damages for breach of contract (*Prothero* v. *Phelps*, 25 L. J. Ch. 105), nor can an action of trespass be brought where the plaintiff has obtained an interlocutory order in Chancery for delivering up possession (*Gedye* v. *Duke of Montrose*, 5 W. R. 537).

Where a vendor took a bond from the purchaser, and afterwards sued at law thereon and in equity on his lien, it was held that he was bound to elect in which court he will proceed (*Barker* v. *Smark*, 3 Beav. 64).

unless relief is independent.

A plaintiff may, however, sue at law for relief not covered by the bill, *Fennings* v. *Humphery*, 4 Beav. 1; thus, he may file a bill for specific performance of a contract to take a lease and sue at law for rent due prior to the contract, *Faulkner* v. *Llewellyn*, 10 W. R. 506; and see *Anglo-Danubian Company* v. *Rogerson*, cited in notes, p. 263, *ante*.

Mortgagees.

And a mortgagee may, as a general rule, proceed at the same time by a bill in equity for foreclosure and at law by action of ejectment or action on the covenant (*Burnell* v. *Martin*, Dougl. 417; *Cockell* v. *Bacon*, 16 Beav. 158; *Lockhart* v. *Hardy*, 9 Beav. 349). But see *Booth* v. *Booth*, 2 Atk. 343; and *Palmer* v. *Hendrie*, 27 Beav. 349; 28 Beav. 341, where it was held that if the mortgagee so deal with the estate as to render it impossible for him to restore it on full payment, the Court will restrain him from suing at law to recover the mortgage money.

Rule 6. Where defendant's answer is excepted to.

6. A defendant, whose answer is excepted to, alleging that the plaintiff is prosecuting him in this court and also at law for the same matter, may by notice in writing require the plaintiff to set down the exceptions within four days from the service of the notice. And if the plaintiff does not set down such exceptions within such four days, or if they are not allowed, such defendant is entitled as of course, on motion or petition, to obtain the usual order for the plaintiff to make his election in which court he will proceed (2nd Nov. 1850; Ord. 13. 8th May, 1845; Ord. 51, and Ord. 16, Art. 21).

ORDER XLII. Miscellaneous Points.

Rule *7. Where no answer required from defendant.

*7. A defendant, from whom an answer is not required, alleging that the plaintiff is prosecuting him in this court and also at law for the same matter, may, upon the expiration of the time within which he might have been served with interrogatories for his examination in answer to such bill, obtain, as of course, on motion or petition, the usual order for the plaintiff to make his election in which court he will proceed (*g*).

(*g*) This rule is new. See, in the analogous case of claims, *Davidson* v. *Mason*, 18 Beav. 540.

Rule *8. Motion to discharge order on answer or affidavit.

*8. In cases referred to in the last three preceding rules, the plaintiff may move to discharge such order, on the merits confessed in the answer, or, if necessary, appearing by affidavit (8th May, 1845; Ord. 51) (*h*).

(*h*) The words "or if necessary appearing by affidavit" are new.

IV. *Interest* (*i*).

Rule 9. Interest on debts.

9. Where a decree or order is made directing an account of the debts of a deceased person, unless otherwise ordered, interest shall be computed on such debts, as to such of them as carry interest, after the rate they respectively carry, and as to all others, after the rate of four per cent. per annum, from the date of the decree or order (16th Oct. 1852; Ord. 10) (*j*).

Rules allowing interest not invalid.

(*i*) This and the following rules relating to interest, though not rules "for carrying the purposes of the Act" of 1852 into effect, nor "for regulating the times, and form and mode of procedure," are, nevertheless, not invalid (because equitable decrees are equivalent to judgments, and judgments at law carry interest, see 1 & 2 Vict. c. 110, ss. 17, 18, *ante*, p. 6); though the 26th rule of the order on the Company's Act (Ord. 11 Feb. 1862) allowing interest on simple contract debts from the date of the winding-up order, is invalid, *Re Herefordshire Banking Company*, 15 W. R. 1055.

Interest on arrears.

From date of decree.

(*j*) As to allowing interest on the *arrears* of an annuity which the testator in the suit had covenanted to pay, see *Jenkins* v. *Bryant*, 16 Sim. 272, and cases there cited, and *Lainson* v. *Lainson*, 18 Beav. 7; *Re Powell*, 10 Hare, 134. Interest will not in general be given from a period anterior to the decree (*Fowler* v. *Fowler*, 4 De G. & J. 250, 275).

Rule 10. Allowance of interest on debts not carrying interest.

10. A creditor, whose debt does not carry interest, who comes in and establishes the same before the judge in chambers, under a decree or order (*k*) of the Court or of the judge in chambers, shall be entitled to interest upon

his debt, at the rate of four per cent. per annum from the date of the decree or order (*l*) out of any assets which may remain after satisfying the costs of the suit, the debts established, and the interest of such debts as by law carry interest (26th Aug. 1841; Ord. 46) (*m*).

(*k*) See note (*j*) to last section as to time from which interest is given.

Where debt disallowed in one suit and established in another.

Where a debt was claimed and disallowed in an administration suit, and it was afterwards established in another suit, and liberty was given to the creditor to apply for payment of his debt in the administration suit, it was held that he was not entitled to interest, as having established his debt in the suit under this rule (*Davis* v. *Combermere*, 15 Sm. 394). This case was decided under the old order, in which the words were "under a decree or order in a suit."

Where debt accrues due after decree.

(*l*) The creditor is not entitled to interest "from the date of the decree," on a debt which accrues due subsequently thereto, *Lainson* v. *Lainson*, 18 Beav. 7.

Priority of voluntary bond.

(*m*) In the administration of assets a voluntary bond will be preferred to interest claimed, under this rule, upon any debt not by law carrying interest (*Garrard* v. *Lord Dinorben*, 5 Hare, 213).

Directions to compute interest when made.

The direction to compute interest may be made on further directions (*Flintoff* v. *Haynes*, 4 Hare, 309).

See, as to allowing interest on debts at law, 3 & 4 Wm. 4, c. 42, s. 28.

Rule 11. Interest on legacies.

11. Where a decree or order is made directing an account of legacies, interest shall be computed on such legacies after the rate of four per cent. per annum, from the end of one year after the testator's death, unless otherwise ordered, or unless any other time of payment or rate of interest is directed by the will, and in that case according to the will (16th Oct. 1852; Ord. 11).

V. *Recognizances.*

Rule 12. Time for enrolment.

12. No recognizance acknowledged in this court, of what nature or kind soever, shall be enrolled therein after six months from the acknowledgment thereof, except under special circumstances, and by an order made by the Court upon motion for the enrolment thereof after that time (22nd July, 1674).

Rule 13. To be given to the Master of the Rolls and Senior Vice-Chancellor.

13. Recognizances which were formerly given to the Master of the Rolls and the Senior Master in Ordinary, shall be given to the Master of the Rolls and the Senior Vice-Chancellor for the time being (16th Oct. 1852; Ord. 15).

Rule 14. Attendance of clerk of enrol-

14. Where, by any decree or order, any recognizance shall be directed to be vacated, the Clerk of Enrolments

ORDER XLII. Miscellaneous Points.

shall, on due notice thereof, attend the Master of the Rolls for that purpose, without any direction for that purpose in such decree or order (22nd Aug. 1859; Ord. 17).

ments on vacating recognizances.

March 6, 1860. Printing of Answers, &c.

ORDER, MARCH 6, 1860.

Printing of Answers, &c.

1. Practice of engrossing answers on parchment discontinued.

1. From and after the 15th day of April, 1860, the practice of engrossing answers on parchment shall be discontinued, and a defendant (except as otherwise provided by Order No. 5) is to file his answer, written bookwise upon paper of the same size and description as that on which bills are printed (*a*).

Answer to be printed.

(*a*) The meaning is that the paper must be durable, see *Morris* v. *Honeycomb*, 2 N. R. 16; the schedules must be on similar paper, *Whale* v. *Griffiths*, 10 W. R. 571; the rule is imperative, and cannot be deviated from without special leave, *Harvey* v. *Bradley*, *ibid.*, 705.

2. Fair copy to be left with Record and Writ Clerks, and examined.

2. At the time when a defendant files his answer, he is to leave with the Clerks of Records and Writs a fair copy thereof (without the Schedules, if any, of accounts or documents) (*b*) and the Clerks of Records and Writs are to examine and correct such copy with the answer filed, and return it, so examined, with a certificate thereon that it is correct and proper to be printed (*b*).

But accounts and documents must be in written schedule.

(*b*) Where the schedule was inadvertently printed, the Court allowed it to be filed, on an undertaking that the solicitor should bear the extra costs occasioned by the printing (*Watt* v. *Watt*, 10 W. R. 368).

As to what schedules to an answer are not *accounts or documents*, and therefore, if necessary to explain the defendant's case, ought to be printed notwithstanding this exception, see *Wright* v. *Wilkin*, 11 W. R. 253.

Books and reports.

Books and reports cannot be filed as schedules to an answer, but may be deposited at the Record and Writ Clerks' Office, and referred to, *Attorney-General* v. *Edmunds*, 15 W. R. 138.

As to the propriety of filing documents, &c., referred to in an answer as exhibits, see note (*b*) to Ord. XV. 1, *ante*, p. 451.

3. Answer to be printed from certified copy before expiration of four days from filing.

3. A defendant is then to cause his answer to be printed from such certified copy, on paper of the same size and description, and in the same type, style, and manner on and in which Bills are required to be printed,

March 6, 1860. Printing of Answers, &c.

and before the expiration of four days from the filing of his answer, is to leave a printed copy thereof with the Clerks of Records and Writs, with a written certificate thereon by the defendant's solicitor, or by the defendant if defending in person, that such print is a true copy of the copy of the answer so certified; and if such printed copy shall not be so left, the defendant shall be subject to the same liabilities as if no answer had been filed (*c*).

Course when answer was not printed.

(*c*) The Court refused to allow a written answer to be filed merely upon the ground that it would save expense (*Meux* v. *Watkins*, 9 W. R. 779); and where a defendant filed a written answer, and did not afterwards print it, he was held liable to attachment until he did so, *Bloxsome* v. *Chichester*, 2 D. J. S. 444.

4. Copy to be ready for delivery to plaintiff.

4. At any time after the expiration of such four days, the defendant, within forty-eight hours after the same shall have been demanded in writing, is to have ready for delivery to the plaintiff an official and certified printed copy of the answer.

5. Defendant may swear to and file printed answer.

5. Notwithstanding the preceding Orders, a defendant is to be at liberty to swear to and file a printed answer.

6. Stamps on office copy.

6. On receiving from the plaintiff a demand for an official and certified printed copy of the answer, the defendant is to get a printed copy thereof examined by the Clerks of Records and Writs with the answer as filed, and to stamp such copy with a Chancery stamp for 5*s*., and the Clerks of Records and Writs, on finding that such copy is duly stamped and correct, are to certify thereon that the same is a correct copy, and to mark the same as an office copy.

7. Delivery of office copy to plaintiff.

7. Such copy is, on demand, to be delivered to the plaintiff, who, on receipt thereof, is to pay to the defendant the amount of the stamp thereon, and at the rate of 4*d*. per folio for the same (*d*).

(*d*) See *Attorney-General* v. *Etheridge*, 11 W. R. 927.

8. Delivery of additional copies.

8. The plaintiff is also to be entitled to demand and receive from the defendant any additional number of printed copies of his answer, not exceeding ten, on payment for the same at the rate of one halfpenny per folio.

March 6, 1860. Printing of Answers, &c.

9. After all the defendants who are required to answer shall have filed their answers, a co-defendant is to be entitled to demand and receive from any other defendant any number of printed copies of his answer, not exceeding six, on payment for the same at the rate of one half-penny per folio.

9. Copies for co-defendants.

10. Office copies of schedules.

10. Office copies of Schedules to answers of accounts or documents are to be obtained according to the practice now existing for obtaining office copies of answers.

11. Plaintiff's answer to defendant's interrogatories.

11. Where a plaintiff is required to answer interrogatories, he is to file his answer thereto, and to get such answer printed, and to furnish printed copies thereof, in the same manner as a defendant is by these Orders required to do with respect to his answer.

12. No interlineation.

12. The Clerks of Records and Writs are not to certify or mark any printed copy of an answer which has any alteration or interlineation in writing (*e*).

Alterations in print of answer.

(*e*) In *Lee* v. *Dawson*, 1 J. & H. 37, however, the Record and Writ Clerks were ordered to certify a printed answer in which some slight errors had been corrected in writing, and to alter the printed copy left with them, so as to correspond with the corrected copy and with the written copy previously certified by the Record and Writ Clerks. Compare note (*d*), p. 162, *ante*, as to print of bill.

13. No costs for written brief of answer.

13. No costs are to be allowed, either as between party and party or as between solicitor and client, for any written brief of an answer, unless the Court shall direct the allowance thereof.

14. Fees.

14. Solicitors are to be entitled to charge the fees mentioned in the Schedule thereto.

15. Orders, except Order I., not to apply to persons suing, &c., in formâ pauperis.

15. These Orders are not to apply to answers filed by defendants or by plaintiffs defending or suing in *formâ pauperis*, except Order 1.

16. Written bills, pleas, &c., to be written on the same paper as bills.

16. Written Bills, Pleas, Demurrers, Special Cases, Duplicates of Summonses, originating proceedings in Chambers, Records for trial, Interrogatories, Examinations, Traversing Notes, Replications, Supplemental Statements, Exceptions and Certificates to be filed in the office of the Clerks of Records and Writs, are to be written on paper of the same description and size as that on which Bills are printed (*f*).

(*f*) See Ord. IX. 3, p. 409, *ante*.

March, 6, 1860. Printing of Answers, &c.

Affidavits to be filed in the office of the Clerks of Records and Writs (*g*) are to be written on foolscap paper bookwise. Depositions of witnesses are to be written on foolscap paper bookwise or briefwise as the Examiner may think fit. Provided nevertheless, that the Clerks of Records and Writs may receive and file affidavits and depositions written otherwise than as here directed, if, in their opinion, the circumstances of the case render such reception and filing desirable or necessary.

(*g*) See Ord. I. 35, p. 378, *ante*.

Filing Affidavits.

17. Interpretation orders.

17. In these Orders the following words have the several meanings hereby assigned to them, over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction; (that is to say) words importing the singular number include the plural number, and words importing the plural number include the singular number, and words importing the masculine gender include females.

SCHEDULE.

	Lower Scale.			Higher Scale.		
For instructions for brief in a suit by Bill on cause coming on for hearing, to be charged on service of notice of motion for a decree, or on service of subpœna to hear judgment . . .	1	1	0	2	2	0
The solicitor of the party answering interrogatories, for perusing the interrogatories . . .	0	6	8	0	13	4
If exceeding 40 folios, at per folio	0	0	0	0	0	4
The solicitor of the party filing an answer, for his attendances on the Record and Writ Clerks, with and for the written and printed copies of the answer, and for certifying . . .	0	6	8	0	13	4

March 6, 1860. Printing of Answers, &c.

	Lower Scale.			Higher Scale.		
For examining and correcting the proof, at per folio . . .	0	0	2	0	0	2
For attending the printer with the answer to be printed . .	0	6	8	0	6	8
For revising the print before swearing, or filing (*g*) at per folio	0	0	2	0	0	2

(*g*) See *Attorney-General* v. *Etheridge*, 11 W. R. 927.

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20 Mar. 1860. Application for Advice of Court.

ORDER, 20th March, 1860 (*a*).

As to Trustees obtaining the Advice of the Court under 22 & 23 Vict. c. 35, s. 30 (a).

1. Title and form of petition, &c.

1. All Petitions, Summonses, Statements, Affidavits, and other written proceedings under the 30th section of the said Act shall be intituled, "In the matter of the said Act, and in the matter of the particular Trust Will or Administration;" and every such Petition and Statement shall be marked in manner directed by the 6th of the Consolidated General Orders, Rule 6 (*b*); and every such Petition or Statement shall state the facts concisely, and shall be divided into paragraphs, numbered consecutively; and every such summons shall, except as to its title, be in the form of the General Summons in Schedule (K.), No. 1 (*c*), subjoined to the Consolidated General Orders.

(*a*) See for this Act, p. 282, *ante*.
(*b*) See p. 396, *ante*.
(*c*) See Appendix, p. xxi. *post*.

2. Statement on which summons is granted to be transmitted to registrar.

2. At the time when any such summons is sealed, the statement upon which the same is grounded shall be left at the Chambers of the Judge, and shall, on the conclusion of the proceeding, be transmitted to the Registrar by the Chief Clerk, with the minutes of the opinion, advice, or direction given by the Judge; and the Registrar shall cause such statement to be transmitted to the Report Office, to be there filed.

March 20, 1860.

Application for Advice of Court.

3. Service of summons or petition.

4. Opinion, &c., of judge, how passed and entered.

5. Fees.

3. Every such Petition or Summons shall be served seven clear days before the hearing thereof, unless the person served shall consent to a shorter time.

4. The opinion, advice, or direction of the Judge shall be passed and entered, and remain as of record, in the same manner as any Order made by the Court or Judge, and the same shall be termed "a Judicial Opinion," or "Judicial Advice," or "Judicial Direction," as the case may be.

5. The fees of Court, and the fees and allowances to Solicitors, on proceedings under the 30th section of the said Act, shall be the same as are now payable under the Consolidated General Orders XXXVIII. and XXXIX., and by the practice of the Court for business of a similar nature.

ORDER, 1st Feb., 1861.

1 Feb. 1861. Investments.

As to Investments of Sums in Court (*a*).

Rule 1. Investment of cash under the control of the Court.

1. Cash under the control of the Court may be invested (*b*) in Bank Stock (*c*), East India Stock (*d*), Exchequer Bills, and 2*l.* 10*s.* per Cent. Annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales; as well as in Consolidated 3*l.* per Cent. Annuities, Reduced 3*l.* per Cent. Annuities, and New 3*l.* per Cent. Annuities.

(*a*) This order is made in pursuance of 23 & 24 Vict. c. 38, s. 10, p. 289, *ante*.

(*b*) For the principles on which the Court acts in authorizing changes of investments, see note (*j*), to 23 & 24 Vict. c. 38, s. 10, *ante*, p. 290. Changing investments.

And for the meaning of cash under the control of the Court, see same note. Cash under control of Court.

(*c*) As to Bank Stock, see Order of Aug. 16, 1861, p. 630, *post*. Bank Stock.

(*d*) The new East India Loan is within these Orders. See note (*t*), p. 285, *ante*. New East India Loan.

Rule 2. Service of petition.

2. Every petition for the purpose of the conversion of any 3*l.* per Cent. Bank Annuities into any other of the stocks, funds, or securities hereinbefore mentioned, shall

1 Feb. 1861. Investments.

be served upon the trustees, if any, of such Bank 3*l.* per Cent. Annuities, and upon such other persons, if any, as the Court shall think fit (*e*).

(*e*) See p. 290, *ante*.

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5 Feb. 1861. Evidence.

ORDER, 5TH FEB. 1861.

ON EVIDENCE (*a*).

Rule 1. Variation of course prescribed by 15 & 16 Vict. c. 86.

1. The course of proceeding prescribed by the statute 15 & 16 Vict. c. 86, with regard to the mode of examining witnesses, and taking evidence in the Court of Chancery, and the practice of the Court relating thereto, shall be and hereby are altered in the manner and to the extent prescribed by the following rules, but not further or otherwise.

(*a*) This order was made in pursuance of 15 & 16 Vict. c. 86, s. 63, p. 224, *ante*; and 23 & 24 Vict. c. 129, s. 8, p. 293, *ante*.

Rule 2. Abrogation of certain rules in the Consolidated Orders.

2. The rules numbered respectively 3 and 4 of the 18th of the Consolidated General Orders, and the rules numbered respectively 3, 7, 9, and 13 of the 19th of the same Orders, are hereby abrogated (*b*).

(*b*) See pp. 464—7, *ante*.

Rule 3. Order to take evidence vivâ voce at the hearing.

3. In any cause *in which issue is joined* (*c*), the plaintiff or any defendant may, at any time within fourteen days after issue joined, apply to the judge in chambers, by summons to be served on the opposite party, for an order that the evidence in chief as to any facts or issues (such facts and issues to be distinctly and concisely specified in the summons) may be taken *vivâ voce* at the hearing of the cause (*d*), and the judge may make an order that the evidence in chief as to such facts and issues or any of them, shall be taken *vivâ voce* at the hearing accordingly; and the facts and issues as to which any such order shall direct that the evidence in chief shall be taken *vivâ voce* at the hearing, shall be distinctly and concisely specified in such order; but in case the judge

shall be satisfied that such application is unreasonable, or made for the purpose of delay, oppression, or vexation, he may refuse to make any such order; and where any such order shall have been made, the examination in chief, as well as the cross-examination and re-examination, shall be taken before the Court at the hearing as to the facts and issues specified in such order. And no affidavit or evidence taken before an examiner shall be admissible at the hearing of any such cause in respect of any fact or issue which shall be included in any such order as aforesaid.

5 Feb. 1861. Evidence.

(*c*) These rules, except part of r. 19 (see note (*s*), p. 626, *post*), do not apply to motions for decree, the practice as to which is still governed by 15 & 16 Vict. c. 86, ss. 15, 40, see note (*h*), p. 170.

(*d*) But an order for trial of issues *before a jury* cannot be obtained either in chambers or by interlocutory application, until the cause is at least set down to be heard. See note (*a*), p. 450, *ante*.

Rule does not apply to trial before *jury*.

4. Save as aforesaid, and save in the case mentioned in the 11th of these rules, it shall not be competent to the plaintiff or any defendant to require, by notice or otherwise, that the evidence in chief to be used at the *hearing of a cause* shall be taken orally. But except as to facts or issues included in any order directing evidence in chief to be taken *vivâ voce* at the hearing under the 3rd of these rules, each party in *a cause in which issue* is joined shall be at liberty to verify his case either wholly or partially by affidavit, or wholly or partially by the oral examination of witnesses *ex parte* before one of the examiners of the Court, or before a special examiner, in the manner prescribed by the 6th of these rules (*e*).

Rule 4. Evidence as to facts not included in any such order.

(*e*) See note (*u*), p. 184, *ante*.

5. The evidence in chief on both sides in any *cause in which issue is joined*, to be used at the hearing thereof, in respect of facts and issues not included in any order for taking evidence in chief *vivâ voce* at the hearing under the 3rd of these rules shall, whether taken by affidavit or before an examiner (and including the cross-examination and re-examination of any witness or other person under the 10th and 11th of these rules) be closed

Rule 5. Closing of evidence to be used at the hearing.

5 Feb. 1861. Evidence.

within eight weeks after issue joined, unless the time be enlarged by special order (*f*).

Time enlarged.

(*f*) As to the time for closing evidence, and as to cases where the time will be enlarged, see notes on p. 191, *ante*.

Rule 6. Alteration in the mode of taking evidence before an examiner.

6. Except in the cases mentioned in the 10th, 11th, 16th, and 17th of these rules, all examinations taken by the examiners of the court, or by any special examiner, for the purpose of being used at the hearing of a *cause in which issue is joined* shall be taken *ex parte* (*g*), and no person shall have a right to be present at the taking of any such examination except the party producing the witness, his counsel, solicitor, and agents; and every examination so taken *ex parte* shall be deemed to be an affidavit (*h*); and the examiner, before transmitting the same to the office of the Clerks of Records and Writs to be filed, shall mark the same as taken *ex parte*, and the Clerks of Records and Writs shall deal with the same as an affidavit (*i*).

Notice of ex parte examination.

(*g*) When a witness refuses to make an affidavit, and a party is desirous of examining him *ex parte* under this rule, he must give notice under rule 22, *post*, see *Ford* v. *Tennant*, 11 W. R. 275.

Discretion of examiners.

(*h*) Nevertheless the examiner has a discretion, and need not take down the answers to improper questions, see *Surr* v. *Walmsley*, cited note (*a*), p. 188, *ante*.

(*i*) This rule puts an end to the publicity of oral evidence (see note (*u*), p. 184, *ante*) in causes where issue is joined; but in causes where notice of motion for decree is given, the evidence is still taken by affidavits, see note (*h*), p. 170, *ante*.

Rule 7. Cross-examination before the Court.

7. Except in the cases mentioned in the 10th, 11th, 16th, and 17th of these rules, no cross-examination of any deponent or witness or of any party, to be used at the hearing of a *cause in which issue is joined*, shall be taken otherwise than before the Court at the hearing (*k*).

(*k*) See note (*u*), p. 185, *ante*.

Cross-examination in open court at *hearing of cause* only.

The cross-examination in open court is not allowed on interlocutory applications in causes where issue is joined, but only at the hearing of the cause, *Bodger* v. *Bodger*, 11 W. R. 80.

Affidavits to be used on motion for decree are open to cross-examination before the examiner as before, see 15 & 16 Vict. c. 86, s. 40, p. 193, *ante*, and note (*h*), p. 170, *ante*.

Where no cross-examination.

As to the admission of evidence for what it is worth, cross-examination being difficult or impossible, see note (*w*), p. 194, *ante*.

Disputed will proved.

A disputed will of real estate may now be proved *vivâ voce* at the hearing, owing to the liberty of cross-examination under this rule, and under 15 & 16 Vict. c. 86, s. 39, p. 192, *ante*; *Chichester* v. *Chichester*, 24 Beav. 289; and see Daniell, 793; Seton, 1118.

5 Feb. 1861. Evidence.

Rule 8. Setting down and hearing where evidence is to be taken vivâ voce.

8. Where any such order as is mentioned *in the 3rd of these rules* has been made, the Clerks of Records and Writs, upon giving a certificate that the *cause* is ready for hearing, shall make, in or upon the certificate, an entry showing that an order for taking evidence in chief *vivâ voce* at the hearing has been made. And the registrars in setting down the cause for hearing in the Cause-book of the judge to whose court the same is attached, shall mark the same so as to indicate that the taking of evidence in chief *vivâ voce* at the hearing has been ordered; and the same shall not come on to be heard without the special direction of the Court, which may be obtained upon an application to the Court, by either party upon notice, to have a day fixed for the hearing.

Rule 9. Mode of compelling attendance of witnesses.

9. Where any such order, as mentioned *in the 3rd of these rules* has been made, each party shall be at liberty to sue out, at the Record and Writ Clerks' Office, *subpœnas ad testificandum* and *subpœnas duces tecum* to compel the attendance at the hearing of witnesses whom he may desire to produce on any issue or matter of fact included in such order. Such *subpœnas* may be according to the forms of *subpœnas* now in use in this court, with such variations as the circumstances of the case shall require (*l*).

(*l*) See form of subpœna in Appendix, p. vii., *post*; compare note (*o*), p. 192, *ante*, as to a subpœna being probably unnecessary where oral examination is applied for at the hearing.

Rule 10. Agreement to take evidence under the old practice.

10. *Notwithstanding any of the preceding rules*, if, at any time *after issue joined*, the parties shall, by writing signed by them or their respective solicitors, and filed at the office of the Clerks of Records and Writs, *agree* that the oral examination in chief and cross-examination of any witness or witnesses (whether a party or parties, or not), or the cross-examination of any person or persons who shall have made an affidavit or affidavits, or who shall have been examined *ex parte* before an examiner, shall be taken before one of the examiners of the court, or a special examiner, in manner provided by the Stat. 15 & 16 Vict. c. 86 (*m*), such examination may be taken accordingly:

5 Feb. 1861. Evidence.

and in case, by virtue of any such agreement, any witness or person shall be examined in chief before the examiner or special examiner, the cross-examination and re-examination of such witness or person shall be taken before the same examiner or special examiner, or his successor in office; and the cross-examination of every witness so examined in chief shall immediately follow his examination in chief, and the re-examination of every witness or person so cross-examined shall immediately follow his cross-examination.

(*m*) See sects. 31—40 of the Act, pp. 184—193, *ante*.

Rule 11. Examination of witnesses who are old, infirm, &c.

11. *Notwithstanding any of these rules*, the Court, or the judge in chambers, may direct that the oral examination and cross-examination of any witness (whether a party or not), or the cross-examination of any person who has been examined *ex parte* before an examiner, or made an affidavit, shall be taken before an examiner of the court or a special examiner (*n*), in the manner prescribed by the statute 15 & 16 Vict. c. 86, as if these rules had not been made, in case it shall appear to the judge that owing to the *age*, *infirmity*, *or absence out of the jurisdiction* of such witness or person, or for any other cause which to the judge shall appear sufficient, it is expedient that such direction should be given. Such direction may be obtained on application to the Court or the judge in chambers on notice.

(*n*) See notes pp. 185—6, *ante*.

Rule 12. Attendance of examiner in such cases.

12. In the case of the examination or cross-examination, under the last preceding rule, of any person in England or Wales, the party requiring such examination or cross-examination may apply to the Court or the judge in chambers for an order that one of the examiners of the Court may attend, for the purpose of such examination or cross-examination, at any place or places in England or Wales to be named in such order (*o*).

(*o*) See note (*w*), p. 185, *ante*.

Rule 13.

13. The examiner shall, in respect of expenses incident

to the performance of his duty under such order as mentioned in the last preceding rule, be entitled to receive, on the production to him of such order, such sums of money as are mentioned in the schedule hereto(*p*). Such sums shall be paid to him by the party obtaining such order; and, subject to any direction of the Court, or of the judge in chambers to the contrary, shall be costs in the cause.

5 Feb. 1861. Evidence.

Expenses of examiner.

(*p*) See p. 629, *post.*

14. Upon any appeal, re-hearing by way of appeal, or further proceedings, the judge's notes of the *vivâ voce* evidence shall *primâ facie* be deemed to be a sufficient note thereof.

Rule 14. Judge's notes to be evidence on appeals.

15. Evidence taken in a cause *subsequently to the hearing* (*q*), shall continue to be taken according to the provisions of the statute 15 & 16 Vict. c. 80, and 15 & 16 Vict. c. 86, subject, however, to any special directions which may be given in any particular case. And all evidence taken at the hearing of any cause may be used in any subsequent proceeding in the same cause.

Rule 15. Evidence after the hearing.

(*q*) See note (*o*) to 15 & 16 Vict. c. 80, s. 30, p. 151, *ante.*

16. In suits to perpetuate testimony, evidence shall continue to be taken according to the now existing practice (*r*).

Rule 16. Evidence in suits to perpetuate testimony.

(*r*) See note (*h*), p. 409, *ante.*

17. The evidence to be used at the hearing of causes in which issue shall have been joined before the first day of Easter Term, 1861, shall be taken according to the now existing practice.

Rule 17. Exception of pending proceedings.

18. No affidavit filed on or after the first day of Easter Term, 1861, shall be used as evidence on any proceeding in any cause or matter unless there be written at the foot thereof, at the time of filing the same, a memorandum stating by whom the same is filed, which memorandum shall be in the form following, or as near thereto as circumstances will admit (that is to say): "This affidavit is filed on the part and behalf of the plaintiffs," (or "of the defendants M. & N.") (*s*).

Rule 18. Memorandum to be written at the foot of an affidavit.

(*s*) As to form of affidavits, see note (*b*), p. 464, *ante.*

5 Feb. 1861. Evidence.

Rule 19. Notices to produce witness for cross-examination.

19. Where in *any cause or matter* a party has filed an *affidavit* (*t*), or where in any cause in which issue has been joined, a party has examined a witness *ex parte* before the examiner under the 6th of these rules, any opposite party desiring to cross-examine the *deponent* or witness, shall not be obliged to procure the attendance of such deponent or witness for cross-examination either before the examiner or before the Court (*u*), but any such opposite party may serve upon the party by whom such *affidavit has been filed* or witness examined, or his solicitor, a notice in writing requiring the production of such *deponent* or witness for cross-examination *before the examiner* (*v*) or before the Court (*w*), as the case may be, such notice to be served within such time as hereinafter mentioned, or within such time as in any case the Court or judge in chambers may specially appoint (that is to say): Where such cross-examination is to be taken before the Court at the hearing of a cause in which issue is joined, then at any time before the expiration of fourteen days (*x*) next after the closing of the evidence; and *where such cross-examination is to be taken before the examiner* in a cause in which a *notice of motion for a decree* or decretal order has been served, and to be used at the hearing of such motion, then at any time *before the expiration of fourteen days next after the end of the time allowed for the plaintiff to file affidavits in reply* (*y*); and in every other case within fourteen days next after the filing of the affidavit or examination upon which such deponent or witness is to be cross-examined (*z*). And unless such *deponent* or witness be produced accordingly, such *affidavit* or examination shall not be used as evidence unless by the special leave of the Court (*a*). The party producing such *deponent* or witness shall be entitled to demand the expenses thereof in the first instance from the party requiring such production, but such expenses shall ultimately be borne as the Court shall direct (*b*).

Cross-examination on motion for decree.

(*t*) The portion of the rule in italics relates to causes where notice of motion for decree is given, and to petitions, &c., in which cases the cross-examination is before an examiner. The remainder of the rule relates to causes where issue is joined, and the cross-examination is *viva voce* at the hearing.

5 Feb. 1861. Evidence.

(*u*) Before this rule, the obligation lay on the cross-examining party (*Winthrop* v. *Elderton*, 1 W. R. 318; *Spicer* v. *Dawson*, 22 Beav. 282), in all cases; and it still lies on him in cases where this order does not apply; *e. g.* where an affidavit was by consent withdrawn at the hearing, and was afterwards used before the chief clerk, *Jenner* v. *Morris*, 10 W. R. 640. See note (*n*), p. 152, *ante*.

Production of witness.

Examiner of court, and special.

(*v*) As to cross-examination before the examiner, see ss. 31—34 of the Chancery Improvement Act, 1852, pp. 184—9, *ante*.

And as to applying for a *special examiner* under this rule, see *Edwards* v. *Spaight*, 2 J. & H. 617, cited in p. 186, *ante*.

(*w*) As to the cross-examination being before the Court in causes where issue is joined, see sect. 7, p. 622, *ante*.

Application for cross-examination after fourteen days from date of deposition.

(*x*) The plaintiff may apply for oral cross-examination of a witness at the hearing, under sect. 39 of the Chancery Improvement Act, 1852 (p. 192, *ante*), though the fourteen days dave elapsed, *Cox* v. *Stephens*, 11 W. R. 929; see *Singer Sewing Machine Company* v. *Wilson*, 11 Jur. N. S. 58. In *Hughes* v. *Spittal*, 13 W. R. 251, it appears that cross-examination was allowed though notice was not given until after the *fourteen days had expired*. And see *Bedwell* v. *Prudence*, 1 Dr. &. S. 221 (decided under the old order, by which a month instead of fourteen days was fixed); but in *Bourdillon* v. *Baddeley*, 26 Beav. 255, cross-examination on an affidavit was not allowed, the time having elapsed.

(*y*) See Ord. XXXIII. 6, p. 533, *ante*, and note (*h*), p. 170, *ante*, as to cross-examination in causes where notice of motion for decree is given.

Within what time cross-examination should follow notice.

No time has been limited within which the cross-examination shall take place, but it must be within reasonable time, see *Hughes* v. *Spittal*, 13 W. R. 251, where two months was named as the time.

Notice to cross-examine.

(*z*) When the notice to cross-examine on an affidavit was given within the fourteen days, but the *petition*, in support of which the affidavit was filed had come on for hearing, V.-C. Wood allowed the withdrawal of the affidavit instead of the cross-examination. *Re Sykes*, 2 J. & H. 415, 417; but see note (*u*), p. 194, *ante*.

(*a*) As to admitting affidavits, on which no cross-examination has taken place, for what they are worth, see note (*w*), p. 194, *ante*.

Costs of cross-examination, costs of suit.

(*b*) As to whether a party who is ordered to pay the costs of a suit is without further order bound to pay costs of a cross-examination under this rule, see *Hunt* v. *Pullen*, 34 Beav. 301.

Rule 20. Mode of compelling attendance for cross-examination.

20. Where any such notice as is mentioned in the 19th of these rules is given, the party to whom it is given shall be entitled to compel the attendance of the deponent or witness for cross-examination before the Court at the hearing of the cause, or before the examiner, as the case may be, in the same way as he might compel the attendance of a witness to be examined, if an order had been made for taking evidence *vivâ voce* at the hearing under the 3rd of these rules.

Rule 21. Hearing, where notice of cross-examination given.

21. Where any such notice as mentioned in the 19th of these rules is given for the production of any deponent or witness, for cross-examination at the hearing of a cause in which issue is joined, either party may, upon notice, apply to the Court or to the judge in chambers, to fix a day for the hearing of the cause.

5 Feb. 1861. Evidence.

Rule 22. Notice of examination or cross-examination.

22. Any party in any cause or matter requiring the attendance of any witness, whether a party or not, before the Court, or before one of the examiners of the court, or a special examiner, for the purpose of being examined, or of being cross-examined, shall give to the opposite party forty-eight hours' notice (*c*), at least, of his intention to examine or cross-examine such witness; such notice to contain the name and description of the witness, and the time and place of such examination or cross-examination, unless the Court shall in any case think fit to dispense with such notice.

Reasonable notice of intention to examine.

(*c*) These words apply to the opposite party; not to the witness, who is entitled to reasonable notice according to circumstances, see *North Wheal Exmouth Mining Company*, 31 Beav. 628.

Rule 23. Each statement in an affidavit to show means of knowledge.

23. Each statement in an affidavit, which is to be used as evidence at the hearing of a cause or matter, or of a motion for a decree or other motion, or on any other proceeding before the Court, or before the judge in chambers, shall show the means of knowledge of the person making such statement (*d*).

(*d*) See form of affidavit, note (*b*), p. 464, *ante*.
The words "I am informed," where there is no personal knowledge, are the same as "I believe," *Woodhatch* v. *Freeland*, 11 W. R. 398.

Rule 24. Consents as to mode of procedure on behalf of persons under disability.

24. In all causes and matters to which any infant, married woman, person of unsound mind, whether found so by inquisition or not, or person under any other disability, is a party, any consent as to the mode of taking evidence, or of any other procedure, shall, if given with the sanction of the Court or of the judge in chambers, by the next friend, guardian, committee, or other person acting on behalf of the person under such disability, have the same force and effect as if such party were under no disability, and had given such consent. Provided that no such consent by any committee of a lunatic shall be valid as between him and the lunatic unless given with the sanction of the Lord Chancellor or Lords Justices sitting in lunacy.

Rule 25.

25. These rules shall come into operation on the first

day of Easter Term, 1861; and the general interpretation clause in the Consolidated General Orders shall be deemed to extend to the rules of this Order.

5 Feb. 1861.
Evidence.
Time of operation and construction.

SCHEDULE.

[Referred to in Rule XIII.]

Expenses to be allowed to an Examiner of the Court when acting under any such Order as mentioned in the 12th of the above rules.

	£	s.	d.
For every day in which he is necessarily, and without any default of his own, detained in the performance of such duty, for his expenses, the sum of	1	1	0
For every mile he travels from the Examiners' Office to the place of examination, and from one of the places of examination or cross-examination (if more than one) to another of them, and from the place where he last acts in such examination or cross-examination to the Examiners' Office, the sum of . .	0	1	6

ORDER 13th July, 1861,

AS TO READING BILLS TAKEN PRO CONFESSO.

13 July, 1861
Pro confesso.

That in all cases in which a Bill of Complaint shall have been or shall be ordered to be taken pro confesso against any defendant or defendants, such Bill may be read at the hearing from a printed copy thereof, stamped with a proper stamp, by one of the Clerks of Records and Writs, indicating the filing of such Bill of Complaint, and the date of the filing thereof; and, where such Bill shall have been amended, the same may be read from a printed copy thereof, or from a copy thereof partly printed and partly written, stamped with the proper stamp, by one of the Clerks of Records and Writs, indicating the amendment

Bills taken pro confesso may be read from printed copy.

13 July, 1861. Pro confesso.

of such Bill and the date thereof, without the attendance of the Clerk of Records and Writs, as hath hitherto been the practice.

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16 Aug. 1861. Bank Stock.

ORDER, 16TH AUGUST, 1861,

AS TO DRAWING DIVIDENDS ON BANK STOCK (*a*).

The whole half-yearly dividend on bank stock to be drawn for under future orders.

I do Order that the Accountant-General of this Court, in acting under Orders hereafter to be made for the payment of Dividends on Bank Stock standing in his name, do, unless the particular Order shall otherwise provide, draw for the whole half-yearly dividend which may from time to time be declared on such stock; and that the said Accountant-General, in acting under Orders heretofore made for the payment of such dividends, and which Orders have been included in or may hereafter be added to any Schedule to any General Order in that behalf already made, do draw for the whole of such half-yearly dividend; but that the said Accountant-General, in acting under any Orders heretofore made and not included in or directed to be added to any such Schedule, do until further order draw for three-and-a-half per cent. only of the half-yearly dividend declared on such bank stock.

(Signed) WESTBURY, C.

(*a*) Bank stock is now one of the recognised investments of the Court, note (*k*), p. 290, *ante*.

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1 Jan. 1862. Deposit on appointment with Examiner.

ORDER, 1ST JANUARY, 1862,

AS TO DEPOSIT BY PARTY OBTAINING APPOINTMENT FOR ORAL EXAMINATION OF WITNESSES BEFORE AN EXAMINER OF THE COURT (*a*).

Party obtaining appointment for examination of witness before examiner of

Every party in a cause or matter who is desirous of having an oral examination of a witness or witnesses before one of the examiners of the Court, shall, at the time when he obtains an appointment for the purpose of

1 Jan. 1862. Deposit on appointment with Examiner.

having such examination taken, deposit with the clerk of the examiner the sum of three pounds (*b*), and in case such party shall fail to attend and duly proceed with the examination of his witness or witnesses at the time appointed for the examination, unless prevented by death, illness, or unavoidable accident, the examiner shall direct the sum so deposited to be paid to the opposite party attending such appointment; and where the appointment shall have been duly attended, or where the examination cannot be proceeded with in consequence of death, illness, or unavoidable accident, the sum so deposited shall be returned to the party who deposited the same (*c*); but in those cases where there is no opposite party, or the opposite party shall fail to attend such appointment, then the respective clerks of the examiners shall once in every six months pay into the Bank of England, into the name of the Accountant-General of this Court, to the credit of the Suitors' Fee Fund Account, the sum so deposited and remaining in the hands of such clerks respectively, in consequence of the appointments not having been duly attended, the amount of the sums so deposited and paid by such clerks as aforesaid to be verified by affidavit.

the court, to deposit 3*l.* with clerk of examiner.

Return of deposit.

This order shall come into operation on the first day of February, 1862.

(*a*) This order was made in pursuance of the Chancery Improvement Act, 1862, s. 63, p. 224, *ante*.

(*b*) The rule does not apply to persons suing in *formâ pauperis*, *Skeets* v. *Hurst*, 1 N. R. 50.

(*c*) Where the first appointment failed owing to a misunderstanding, the 3*l.* was returned on a new appointment and a new deposit being made, *Perkes* v. *Stodhart*, 11 W. R. 586.

Deposit where first appointment failed.

ORDER, 1st February, 1862,

1 Feb. 1862. Petitions of Right.

PETITIONS OF RIGHT.

1. Upon Her Majesty's fiat (*a*) being obtained to any petition of right presented in pursuance of the said Act and intituled in the Court of Chancery, such petition, with the fiat thereon, together with a printed copy of such

Rule 1. Petition of right to be filed at Record and Writ office.

1 Feb. 1862. Petitions of Right.

petition and fiat (if the petition is in writing), shall be filed at the office of the Clerks of Records and Writs.

Petition of right affecting Crown property. Petition of Right Act, 1860.

(*a*) As to a petition of right, see Mitf. Pl. 33. "When the Crown is *in possession*, or any title is *vested* in it which a suit seeks to divest or affect, or its rights are the immediate and sole object of the suit, the application must be to the Queen by petition of right," *ibid.* This order was made in pursuance of the Petition of Right Act, 1860 (23 & 24 Vict. c. 34), as to which Act see Seton, 1112 ; Daniell, 130.

The fiat of the Queen is obtained at the Home Office, and the petition may be presented to any superior court of law or equity in which the subject matter, or any material part thereof, would have been cognizable in a suit between subject and subject.

Rule 2. Marked with name of judge.

2. Every such petition, or the printed copy thereof, so filed shall be marked with the words "Lord Chancellor" or "Master of the Rolls," and if with the words "Lord Chancellor," then also with the title of the Vice-Chancellor before whom it is intended to be prosecuted.

Rule 3. Printed and stamped copies for service.

3. Every copy of a petition of right left at the office of the Solicitor of the Treasury in pursuance of the said Act, and every copy of a petition of right served upon or left at the last, or usual, or last known place of abode of any person under the provisions of that Act shall be a printed copy, sealed with the seal of the office of the Clerks of Records and Writs, in the same manner as copies of bills are now sealed (*b*). And the leaving or serving of any copy not printed or not sealed with the office seal shall be of no effect for any of the purposes of the said Act.

(*b*) As to the seal or stamp of the clerks of records and writs, see 15 & 16 Vict. c. 86, s. 3, p. 162, *ante*.

Rule 4. Interrogatories for examination of respondents.

4. A suppliant in any petition under the said Act desiring to file interrogatories for the examination of any person or persons who may be required to plead or answer thereto (other than Her Majesty's Attorney-General) (*c*), shall file such interrogatories at the same time as such petition. And a copy, examined and marked by the Clerks of Records and Writs, of the interrogatories which any respondent is required to answer shall be served upon such respondent, together with the copy of the petition.

(*c*) As to answers by the Attorney-General, see 23 & 24 Vict. c. 34, ss. 3, 4, 6, 7.

Rule 5. Right to petition in formâ pauperis.

5. Any person who might be admitted to prosecute a suit in this court *in formâ pauperis* (*d*) may be admitted to

1 Feb. 1862. Petitions of Right.

prosecute in formâ pauperis a petition of right intituled in this court. And any person who might, if a defendant to an ordinary suit in this court, have been admitted to defend in formâ pauperis may be admitted to make his defence in formâ pauperis to any petition of right instituted in this court which he may be required to plead or answer to. But no person shall be admitted to prosecute any petition in formâ pauperis without a certificate of counsel that he conceives the case to be proper for relief in this court.

(*d*) See note to Ord. VII. 8, p. 403, *ante*.

Rule 6. Rules as to petitioning in formâ pauperis.

6. The same orders and rules shall apply with regard to any person admitted to sue or defend in formâ pauperis under these Orders as are applicable with regard to paupers in suits between subject and subject.

Rule 7. Practice in reference to suits shall apply to proceedings by petition of right.

7. So far as the same may be applicable, and except in so far as may be inconsistent with the said Act and with the preceding Orders, the General Orders from time to time in force as to proceedings in suits in this court, and the practice and course of proceeding in this court in reference to such suits, shall be applicable, and apply and extend to proceedings in this court in petitions under the said Act, which are, for the purposes of this Order, to be considered as bills (*e*).

Rule 8. Defence to petition of right.

(*e*) The petition being left at the office of the solicitor to the Treasury (r. 3), may be pleaded or demurred to, or answered, for which purpose further time may be allowed. In default it may be taken *pro confesso*, 23 & 24 Vict. c. 34, s. 8; a decree may be made and costs given as in a suit instituted by bill, *ibid.* ss. 9—14. See *Tobin* v. *The Queen*, 11 W. R. 915.

Notwithstanding the Act and these rules, any suppliant may proceed according to the practice before the Act (s. 18); under which the Court did not at the hearing of the petition enter into the merits, but directed a commission to inquire whether a suit should be instituted. See Mitf. Plead. 33. Daniell, 131—3.

Rule 8. Duties and fees of officers of the court.

8. The duties which under the said Act and the said Orders may be required to be performed by officers of this court, shall be performed by the officers respectively, who perform duties of a similar nature in suits in this court between subject and subject. And the fees and allowances payable to all officers and solicitors of this court, in respect of matters under the said Act, shall be

1 Feb. 1862. Petitions of Right.

such fees and allowances as, by the practice of the court and the General Orders from time to time in force, they are entitled to take and charge for similar proceedings in cases between subject and subject.

WESTBURY, C.
JOHN ROMILLY, M. R.
RICHD. T. KINDERSLEY, V. C.

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16 May, 1862. Printing of affidavits.

ORDER, 16TH MAY, 1862,

PRINTING OF AFFIDAVITS (*a*).

Rule 1. Affidavits to be printed.

1. All affidavits and depositions which are to be used on the hearing of any cause in which issue shall be joined, or a notice of motion for a decree served after the eighteenth day of June, one thousand eight hundred and sixty-two, shall be printed except as hereinafter mentioned.

(*a*) This order was made in pursuance of the powers given by 15 & 16 Vict. c. 86, s. 63 (p. 224, *ante*).

Form of affidavits.

As to form of affidavits generally, see note (*b*), p. 464, *ante*.

Rule 2. Manner of printing.

2. Such affidavits and depositions shall be printed under the direction and superintendence of the Clerks of Records and Writs, upon paper of such kind and dimensions and with such type as are prescribed by the General Order for the printing of bills (*b*), and in all other respects in such form and manner as the Clerks of Records and Writs shall deem to be most convenient, and the expense of such printing shall be paid out of the same fund and in like manner as the expense of making office copies is now paid (*c*).

(*b*) As to the printing of bills, see Ord. IX. 3, p. 409, *ante*.

(*c*) As to expense of office copies, see Ord. XXXVI. 1, p. 562, *ante*; and Regulations as to Fees, Appendix, p. xlix. *post*.

Rule 3. Copy to be left at Record and Writ Office.

3. Solicitors and parties on filing affidavits hereby required to be printed, are to leave with the Clerks of Records and Writs a fair copy of each affidavit filed, such copy to be written on draft paper, on one side only, and

to be certified by the solicitor or party to be a correct copy of the affidavit filed.

16 May, 1862. Printing of affidavits.

Rule 4. Time for printing affidavits where issue joined.

4. In a cause in which issue is joined, the Clerks of Records and Writs shall, *upon the application of any party to the suit*, cause such affidavits and depositions (other than depositions taken on the oral cross-examination of witnesses who have made such affidavits) to be printed after the expiration of the time fixed for closing the evidence; and such last mentioned depositions after the expiration of the time allowed for the oral cross-examination of such witnesses (*d*).

(*d*) There is now no oral cross-examination in causes where issue is joined, otherwise than *before the Court* at the hearing, except in the cases excepted by rr. 10, 11, 16, 17 of the Ord. 5th February, 1861 (pp. 623—625, *ante*); and see note (*u*), p. 184, *ante*.

Rule 5. Time for printing affidavits on motions for decree.

Depositions on cross-examination.

5. In a cause in which a notice of motion for a decree is served, the Clerks of Records and Writs shall, *upon the application of any party to the suit*, cause the affidavits filed on behalf of the plaintiffs, the affidavits filed on behalf of the defendants, and the affidavits of the plaintiffs in reply, to be printed after the time respectively allowed for filing each set of such affidavits, and the depositions taken on the oral cross-examination of the witnesses who have made such affidavits after such depositions shall have been filed (*e*).

(*e*) See note (*h*), p. 170, *ante*.

Rule 6. Payment for copies by party filing.

6. Every party who files an affidavit or causes depositions to be taken, is to take from the Clerks of Records and Writs a printed copy of every affidavit filed by him, and of all such depositions, for which he is to pay in stamps at the rate of twopence per folio, and unless such copy is taken, he is not to be allowed anything in the taxation of costs in respect of such affidavit or depositions.

Rule 7. By opposite parties.

7. All parties are to be at liberty to take from the Clerks of Records and Writs as many other printed copies of their own and of their opponents' affidavits and depositions as they may require, on paying for the same in stamps at the rate of one penny per folio.

16 May, 1862. Printing of affidavits.

Rule 8. Solicitors' fees for copies.

8. Solicitors are to be allowed, on the taxation of costs, the same fees for printed copies of the affidavits and depositions used for the briefs of counsel as solicitors are now allowed for written copies; and in country agency causes they are also to be allowed at the rate of fourpence per folio for one other printed copy of the affidavits and depositions of the opposite party, but for all other printed copies which may be necessarily used in the progress of the cause, solicitors are to be allowed only the sums actually paid for the same (*f*).

(*f*) See Appendix, p. xl. *post*.

Rule 9. Affidavits on interlocutory applications not to be printed.

9. Affidavits and depositions which shall have been filed for the purpose of any interlocutory application, and of which office copies shall have been taken for that purpose, are excepted from the operation of this Order.

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12 Feb. 1863. Accountant-General's certificates.

ORDER, 12TH FEBRUARY, 1863,

SIGNATURE TO ACCOUNTANT-GENERAL'S CERTIFICATES (*a*).

WHEREAS by reason of the growing increase of the business of this court, the number of certificates and documents of the like nature requiring the signature of the Accountant-General has become so great as inconveniently to interfere with his discharge of other and indispensable duties; now therefore, upon reading an Act of Parliament passed in the twelfth year of the reign of His Majesty King George the First, intituled, "An Act for better securing the monies and effects of the Suitors of the Court of Chancery, and to prevent the counterfeiting of East India Bonds, and endorsements thereon, as likewise endorsements on South Sea Bonds" (*b*), I do order that all certificates of funds in court, and of transactions that have been recorded in the books of the Accountant-General; that is to say, payment of cash into court, sales, purchases, transfers and acceptances of stock, and carryings over of funds from one account to another, shall be

signed by the Chief Clerk of the Accountant-General for the time being, in his own name, as for and on behalf of the said Accountant-General. 12 Feb. 1863. Accountant-General's certificates.

(*a*) As to the certificates of the state of accounts, &c., filed from time to time by the Accountant-General, see Daniell, 1623.
(*b*) This Act created the office of Accountant-General.

ORDER, 2ND AUGUST, 1864,

2 Aug. 1864. Taxation by Summons in Chambers.

APPLICATION FOR A TAXATION BY SUMMONS IN CHAMBERS.

[This order was signed by the Lord Chancellor and two other judges only, and was therefore invalid (see *Short* v. *Roberts*, cited p. 646, *infra*), and was re-published in April 17, 1867, p. 648, *post*.]

ORDER, 27TH MAY, 1865,

27 May, 1865. Advertisements for Creditors.

ADVERTISEMENTS FOR CREDITORS (*a*).

1. Every advertisement for creditors affecting the estate of a deceased person, which shall be issued pursuant to any decree or order, shall direct every creditor, by a time to be thereby limited, to send to the executor or administrator of the deceased, or to such other party as the judge shall direct, or to his solicitor, to be named and described in such advertisement, the name and address of such creditor, and the full particulars of his claim, and a statement of his account, and the nature of the security (if any) held by him; and such advertisement shall be in the form numbered (1) in the second schedule hereto, with such variations as the circumstances of the case may require; and at the time of directing such advertisement a time shall be fixed for adjudicating on the claims.

Rule 1. Advertisements for creditors affecting the estate of deceased person.

(*a*) This order was made in pursuance of the 30th sect. of Sir G. Turner's Act, p. 131, *ante;* and the 28th sect. of the Master in Chancery Abolition Act, p. 156, *ante.*
As to advertisements for claimants under administration decree generally, (Ord. XXXV. 35 and 45, and note (*f*), p. 557, *ante.*

27 May, 1865. Advertisements for Creditors.

2. No creditor need make any affidavit nor attend in support of his claim (except to produce his security), unless he is served with a notice requiring him to do so, as hereinafter provided.

Rule 2. Creditor need not make affidavit or attend unless required.

Rule 3. Notice to creditor to produce security, or other evidence.

3. Every creditor shall produce the security (if any) held by him, before the judge, at such time as shall be specified in the advertisement for that purpose, being the time appointed for adjudicating on the claims; and every creditor shall, if required by notice in writing, to be given by the executor or administrator of the deceased, or by such other party as the judge shall direct, produce all other deeds and documents necessary to substantiate his claim before the judge, at his chambers, at such time as shall be specified in such notice.

Rule 4. Creditor neglecting notice not to be allowed costs of proving.

4. In case any creditor shall neglect or refuse to comply with the preceding Rule numbered (3), he shall not be allowed any costs of proving his claim, unless the judge shall otherwise direct.

Rule 5. Claims to be examined and result verified by affidavit of executor or other person appointed by judge.

5. The executor or administrator of the deceased, or such other party as the judge shall direct, shall examine the claims sent in pursuant to the advertisement, and shall ascertain, so far as he is able, to which of such claims the estate of the deceased is justly liable; and he shall, at least seven clear days prior to the time appointed for adjudication, file an affidavit, to be made by such executor or administrator, or one of the executors or administrators, or such other party, either alone or jointly with his solicitor, or other competent person, or otherwise as the judge shall direct, verifying a list of the claims the particulars of which have been sent in pursuant to the advertisement, and stating to which of such claims, or parts thereof respectively, the estate of the deceased is, in the opinion of the deponent, justly liable, and his belief that such claims, or parts thereof respectively, are justly due and proper to be allowed, and the reasons for such belief.

Rule 6. Such affidavit may be postponed.

6. In case the judge shall think fit so to direct, the making of the affidavit referred to in the preceding Rule numbered (5), shall be postponed till after the day ap-

pointed for adjudication, and shall then be subject to such directions as the judge may give. 27 May, 1865. Advertisements for Creditors.

Rule 7. Adjudication on the claims.

7. At the time appointed for adjudicating upon the claims, or at any adjournment thereof, the judge may, in his discretion, allow any of the claims, or any part thereof respectively, without proof by the creditors, and direct such investigation of all or any of the claims not allowed, and require such further particulars, information, or evidence, relating thereto, as he may think fit, and may, if he so think fit, require any creditor to attend and prove his claim, or any part thereof; and the adjudication on such claims as are not then allowed shall be adjourned to a time to be then fixed.

Rule 8. Notice to creditors of claims allowed or disallowed.

8. Notice shall be given by the executor or administrator, or such other party as the judge shall direct, to every creditor whose claim, or any part thereof, has been allowed without proof by the creditor, of such allowance, and to every such creditor as the judge shall direct, to attend and prove his claim, or such part thereof as is not allowed, by a time to be named in such notice, not being less than seven days after such notice, and to attend at a time to be therein named, being the time to which the adjudication thereon shall have been adjourned; and in case any creditor shall not comply with such notice, his claim, or such part thereof as aforesaid, shall be disallowed.

Rule 9. Sending in new claims before adjourned adjudication.

9. Any creditor who has not before sent in the particulars of his claim pursuant to the advertisement, may do so four clear days previous to any day to which the adjudication is adjourned.

Rule 10. Special leave to make other claims after time fixed by the advertisement.

10. After the time fixed by the advertisement, no claim shall be received (except as before provided in case of an adjournment), unless the judge shall think fit to give special leave upon application made by summons, and then upon such terms and conditions as to costs and otherwise as the judge shall direct (*b*).

(*b*) See note (*p*) to Ord. XXXV. 12, p. 547, *ante*.

Rule 11.

11. The Rules numbered 37, 38, 41, 42, and 43, of the

27 May, 1865. Advertisements for Creditors.

35th Consolidated General Order are hereby abrogated, in so far only as the same relate to creditors.

Abrogation of certain rules.

Rule 12. Notice to creditors of cheques of Accountant-General being ready.

12. Where any decree or order is made for payments by the Accountant-General to creditors, the party whose duty it is to prosecute such decree or order shall send to each such creditor, or his solicitor (if any), a notice that the cheques may be received from the Accountant-General; and such party shall, when required, produce such decree or order, and any other papers necessary to enable such creditors to receive their cheques and get them passed.

Rule 13. When notice sufficient.

13. Every notice by this Order required to be given, shall, unless the judge shall otherwise direct, be deemed sufficiently given and served if transmitted by the post, prepaid, to the creditor to be served, according to the address given by such creditor in the claim sent in by him pursuant to the advertisement, or, in case such creditor shall have employed a solicitor, to such solicitor, according to the address given by him.

Rule 14. Fees.

14. Solicitors shall be entitled to charge and be allowed the fees set forth and referred to in the first schedule to this Order, for business done under this Order.

Rule 15. Forms.

15. The forms set forth or referred to in the second schedule to this Order, with such variations as the circumstances of each case shall require, shall be adopted for the respective purposes therein mentioned.

Rule 16. Date.

16. This Order shall come into operation on and after the 15th day of June, 1865; and the General Interpretation Clause in the Consolidated General Orders shall be deemed to extend to this Order; and the word "Creditor" used in this Order, and in the forms subjoined hereto, shall include a person claiming any debt or liability affecting the personal estate of a deceased person, under any Order made pursuant to the Statute 13th and 14th Victoria, chapter 35.

THE FIRST SCHEDULE.

FEES AND CHARGES TO BE ALLOWED TO SOLICITORS.

	Lower Scale.			Higher Scale.		
For every notice which may be sent by the post, including the sending	0	2	6	0	2	6
For every other notice, including the service	0	5	0	0	5	0
For attendances on the Accountant-General to bespeak all cheques for sums payable to creditors under any decree or order .	0	6	8	0	13	4
For all other attendances on the Accountant-General and Registrar to produce papers necessary to enable all creditors to receive their cheques under any decree or order, and get them passed .	0	6	8	0	13	4
And if the number of such cheques exceeds two, for every additional number not exceeding two .	0	6	8	0	6	8
Except that the last-mentioned fees shall not in any case (unless the Taxing Master shall in his discretion think fit, under special circumstances, to allow a larger amount) exceed . .	3	3	0	5	5	0

For all other business, the same fees and allowances as are authorised by the 2nd Rule of the 38th of the Consolidated General Orders, and the Regulations as to Solicitors' fees subjoined thereto, and by the practice of the Court, for business of a similar nature, except the special fees applicable to creditors coming in under the Rules of the 35th of the Consolidated General Orders which are abrogated by this Order.

THE SECOND SCHEDULE.

FORMS.

No. 1. *Advertisement for Creditors.* [Rule 1.]

Pursuant to a decree [*or*, an order] of the High Court of Chancery, made in [the matter of the estate of A. B., and in] a cause, S. against P., the creditors of A. B., late of , in the county of , who died in or about the month of , 18 , are, on or before the day of , 18 , to send by post, prepaid, to E. F., of , the solicitor of the defendant C. D., the executor [*or*, administrator] of the deceased [*or as may be directed*], their Christian and surnames, addresses and descriptions, the full particulars of their claims, a statement of their accounts, and the nature of the securities (if any) held by them; or, in default thereof, they will be peremptorily excluded from the benefit of the said decree [*or*, order]. Every creditor holding any security is to produce the same before the Master of the Rolls [*or*, Vice-Chancellor], at his chambers; situated at, *&c.*, on the day of , 18 , at o'clock in the noon, being the time appointed for adjudicating on the claims.

Dated this day of , 18 .

G. H.,

Chief Clerk.

No. 2. *Notice to Creditor to produce Documents.* [Rule 3.]

(*Short Title.*)

You are hereby required to produce, in support of the claim sent in by you against the estate of A. B., deceased [*describe any probate, administration, deed, or document required*], before the Master of the Rolls [*or*, Vice-Chan-

cellor], at his chambers, situate at, *&c.*, on the day of , 18 , at o'clock in the noon. 27 May, 1865

Dated this day of , 18 .

G.R., of, &c., solicitor for plaintiff [or defendant, *or as may be.*]

To Mr. S. T.

No. 3. *Affidavit of Executor or Administrator as to Claims.*

[Rule 5.]

In Chancery.

(*Title.*)

We, C. D., of, &c., the above-named plaintiff [*or*, defendant, *or as may be*], the executor [*or*, administrator], of A. B., late of , in the county of , deceased, and E. F., of, &c., solicitor, severally make oath and say as follows:

I, the said E. F., for myself say as follows:

1. I have in the paper writing now produced and shown to me, and marked A, set forth a list of all the claims the particulars of which have been sent in to me by persons claiming to be creditors of the said A. B., deceased, pursuant to the advertisement issued in that behalf, dated the day of , 18 .

And I, the said C. D., for myself say as follows:

2. I have examined the particulars of the several claims mentioned in the paper writing now produced and shown to me, and marked A, and I have compared the same with the books, accounts, and documents of the said A. B. [*or as may be, and state any other inquiries or investigations made*], in order to ascertain, so far as I am able, to which of such claims the estate of the said A. B. is justly liable.

3. From such examination (*and state any other reasons*), I am of opinion, and verily believe, that the estate of the said A. B. is justly liable to the amounts set forth in the sixth column of the first part of the said paper writing

27 May, 1865.

marked A; and to the best of my knowledge and belief such several amounts are justly due from the estate of the said A.B., and proper to be allowed to the respective claimants named in the said schedule.

4. I am of opinion that the estate of the said A.B. is not justly liable to the claims set forth in the second part of the said paper writing marked A, and that the same ought not to be allowed without proof by the respective claimants [*or*, I am not able to state whether the estate of the said A.B. is justly liable to the claims set forth in the second part of the said paper writing marked A, or whether such claims, or any parts thereof, are proper to be allowed without further evidence].

Sworn, &c.

No. 4. *Exhibit referred to in Affidavit No.* 3.

A.

(*Short Title.*)

List of claims the particulars of which have been sent in to E.F., the solicitor of the plaintiff [*or*, defendant, *or as may be*], by persons claiming to be creditors of A.B., deceased, pursuant to the advertisement issued in that behalf, dated the day of , 18 .

This paper writing marked A, was produced and shown to , and is the same as is referred to in his affidavit, sworn before me this day of , 18 .

W.B., &c.

First Part.—Claims proper to be allowed without further evidence.

Serial No.	Names of Claimants.	Addresses and Descriptions.	Particulars of Claim.	Amount Claimed.	Amount proper to be allowed.
				£ s. d.	£ s. d.

Serial No.	Names of Claimants.	Addresses and Descriptions.	Particulars of Claim.	Amount Claimed.
				£ s. d.

No. 5. *Notice to Creditor to prove his Claim.* [Rule 8.]

(*Short Title.*)

You are hereby required to prove the claim sent in by you against the estate of A.B., deceased. You are to file such affidavit as you may be advised in support of your claim, and give notice thereof to me, on or before the day of next; and to attend, by your solicitor, at the chambers of the Master of the Rolls [*or*, Vice-Chancellor], situate at, *&c.*, on the day of , 18 , at o'clock in the noon, being the time appointed for adjudicating on the claim.

Dated this day of , 18 .

G.R., of, &c., solicitor for the plaintiff [*or*, defendant, *or as may be*].

To Mr. S.T.

No. 6. *Notice to Creditor of Allowance of Claim.* [Rule 8.]

(*Short Title.*)

The claim sent in by you against the estate of A.B., deceased, has been allowed at the sum of £ , with interest thereon at £ per cent., per annum, from the day of , 18 , and £ for costs.

[*If part only allowed, add,* If you claim to have a larger sum allowed, you are hereby required to prove such further claim, and you are to file, *&c., as in Form No.* 5].

Dated this day of , 18 .

G.R., of, &c., solicitor for the plaintiff [*or*, defendant, *or as may be*].

To Mr. P.R.

27 May, 1865.

No. 7. *Notice that Cheques may be received.* [Rule 12.]

(*Short Title.*)

The cheques for the amounts directed to be paid to the creditors of A.B., deceased, by an order made in this [matter and] cause, dated the day of 18 , may be received at the Accountant-General's Office on and after the day of , 18 .

G. R., of, &c., solicitor for the plaintiff [*or*, defendant, *or as may be*].

To Mr. W.S.,
&c.

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7 May, 1866.

ORDER, MAY 7TH, 1866.

ENROLMENT OF DECREES.

[This order abrogated Ord. XXIII. 29 (relating to the transmission of the docket to the Public Record office for enrolment), as it then stood, and re-enacted it as it is now printed, p. 498, *ante*.]

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6 Oct. 1866.

ORDER, 6TH OCTOBER, 1866.

SETTING DOWN MOTIONS FOR DECREE.

[This order, which was in the same terms as order 22 Nov. 1866, was held to be invalid, as having been made by the Lord Chancellor with the advice and assistance of two only of the other judges. *Short* v. *Roberts*, 2 L. R. Ch. 13.]

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22 Nov. 1866.

ORDER, 22ND NOVEMBER, 1866.

SETTING DOWN MOTIONS FOR DECREE.

1. Article 1 of *Rule* 10 of *Order* 33 of the Consolidated General Orders, and *Rules* 12 and 13 of the same Order, shall be respectively varied (*a*), and as varied shall be respectively read as follows:

Article 1 of Rule 10 of Order XXXIII. and Rule 12 of the same Order, shall be respectively read as if the words "or set down a motion for Decree or Decretal Order," were expunged therefrom respec-

tively, and in lieu of those words, the words "or serve a notice of motion for a Decree or Decretal Order," were inserted therein respectively: 22 Nov. 1866.

And Rule 13 of the same Order, shall he read as if the words "unless a motion for a Decree or Decretal Order shall have been set down in the meantime" were expunged therefrom, and in lieu of those words, the words "unless a notice of motion for a Decree or Decretal Order shall have been served in the meantime" were inserted therein.

(*a*) See the variations printed in italics, *ante*, pp. 535 and 539.

2. The plaintiff, who has served a notice of motion for a decree or decretal order, shall set down such motion within one week after the expiration of the time allowed to him by Rule 7 of Order 33, to file his affidavits in reply, in case the defendant shall have filed any affidavit—or within one week after the expiration of the time allowed to the defendant, by Rule 6 of Order 33, to file his affidavits in answer, in case the defendant shall not have filed any affidavit (*b*). But in case the time allowed for either of the purposes aforesaid shall be enlarged, then within one week after the expiration of such enlarged time.

(*b*) See note (*p*), *ante*.

3. If the plaintiff shall fail to set down the motion within the time above limited, the defendant may either move to dismiss the bill with costs, for want of prosecution, or set the motion down at his own request (*c*).

(*c*) See note (*b*), p. 470, *ante*.

4. The Clerk of Records and Writs shall not give a certificate, that a motion for a decree or decretal order is in a fit state to be set down until after the expiration of the time allowed to the plaintiff, by Rule 7 of Order 33, to file his affidavits in reply, in case the defendant shall have filed any affidavits, or until after the expiration of the time allowed by the defendant by Rule 6 of Order 33, to file his affidavits in answer, in case the defendant shall not have filed any affidavit. But in case the time allowed for

22 Nov. 1866.

either of the purposes aforesaid shall be enlarged, then not until after the expiration of such enlarged time (*d*).

(*d*) See note (*f*), p. 514, *ante*.

5. In all cases in which the time allowed by Rules 6 and 7 of Order 33, for filing affidavits in answer or in reply, shall be enlarged, notice thereof shall be given to the Clerk of Records and Writs by production of the Order for such enlargement.

17 April, 1867.

ORDER, 17TH APRIL, 1867.

SUMMONS FOR TAXATION OF COSTS (*a*).

Rule 1. Special applications under 6 & 7 Vict. c. 73, to be by summons in chambers.

1. All *applications* made under the Statute 6th and 7th Victoria, chapter 73, *to refer any* bill of any attorney or solicitor of his fees, charges, and disbursements, for any business done by such attorney or solicitor, *to be taxed* and settled, and for the *delivery* of such bill, and for the *delivering up of deeds*, documents, and papers, or for any or either of those purposes, shall hereafter be made to a judge at chambers by summons, instead of by special petition to the Court, except applications for orders of course, which are to be made as heretofore (*b*).

(*a*) This order was made in pursuance of 15 & 16 Vict. c. 80, sect. 28, p. 156, *ante*, and c. 86, sect. 63, p. 224, *ante*.

And see the invalid order of Aug. 2, 1864, p. 637, *ante*.

Special applications for taxation.

(*b*) All special applications for taxation must now be made by summons, though the client also asks that a sum of money improperly retained by the solicitor may be refunded, *Re May*, 34 Beav. 132. See note (*r*), p. 18; (*z*) p. 23, *ante*, as to special applications.

Rule 2.

[Rule 2 abrogated Ord. XL. 35, 36 (relating to *reviewals of taxation*), and rules 3 and 4 re-enacted them as they are now printed (pp. 593, 594, *ante*), providing as follows.]

Rule 3. Reviewal of taxation by summons in chambers.

3. Any party who may be dissatisfied with the certificate of the taxing-master as to any item or part of an item, may apply to the judge by whom the order for taxation shall have been made; and such application shall be made by a summons in chambers (*c*).

(*c*) See note (*l*), p. 593, *ante*.

APPENDIX.

SCHEDULES TO THE GENERAL ORDERS.

SCHEDULE (A).

Schedule (A).

[Referred to in the 2nd Rule of Order IX.]

FORM OF BILL.

In Chancery.

Lord Chancellor.
V.-C. Wood.
[*or*] Master of the Rolls.

Between John Lee . . . . . Plaintiff.

and

James Styles and Henry Jones . . . . . Defendants.

Bill of Complaint.

To the Right Honourable FREDERICK LORD CHELMSFORD, of Chelmsford, in the County of Essex, Lord High Chancellor of Great Britain.

Humbly complaining, showeth unto his Lordship, John Lee, of Bedford Square, in the County of Middlesex, Esq. (*a*), the above-named plaintiff, as follows :—

1. The defendant James Styles, being seised in fee-simple of a farm called Blackacre, in the parish of A., in the county of B., with the appurtenances, did, by an Indenture dated the 1st of May, 1850, and made between the defendant James Styles of the one part, and the plaintiff of the other part, grant and convey the said farm with the appurtenances unto, and to the use of, the plaintiff, his heirs, and assigns, subject to a proviso for redemption thereof, in case the defendant James Styles, his heirs, executors, administrators, or assigns, should on the 1st of May, 1851, pay to the plaintiff, his executors, administrators, or assigns, the sum

Schedule (A).

of 5000*l.*, with interest thereon, at the rate of 5*l.* per centum per annum, as by the said Indenture will appear.

(*a*) The description must be fully set out, or the plaintiff will be required to give security for costs, as to which see note to Ord. XL. 6 (*ante*).

Address of next friend.

When a bill is filed by a next friend on behalf of an infant, the address of the next friend must be fully set out (*Major* v. *Arnott*, 4 W. R. 229); and it is not enough that the address of the next friend should appear on the written authority filed with the bill in pursuance of the 15 & 16 Vict. c. 86, s. 11 (*ibid.*;

Misdescription may be pleaded.

but see *Watts* v. *Kelly*, 6 W. R. 206). The defendant may plead a misdescription of the plaintiff; but such plea must be very precise in its averments (*Smith* v. *Smith*, Kay, App. xxii.; *Rowley* v. *Eccles*, 1 Sim. & S. 511, but that was doubted in *Bainbrigge* v. *Orton*, 20 Beav. 28); and a clerical error in the description is not a ground for a plea (*Cust* v. *Southee*, 19 L. J. Ch. 526).

2. The whole of the said sum of 5000*l.*, together with interest thereon at the rate aforesaid, is now due to the plaintiff.

3. The defendant Henry Jones claims to have some charge upon the farm and premises comprised in the said Indenture of Mortgage of the 1st of May, 1850, which charge is subsequent to the plaintiff's said mortgage.

4. The plaintiff has frequently applied to the defendants, James Styles and Henry Jones, and required them either to pay the said debt, or else to release the equity of redemption of the premises, but they have refused so to do.

5. The defendants, James Styles and Henry Jones, pretend that there are some other mortgages, charges, or incumbrances, affecting the premises, but they refuse to discover the particulars thereof.

6. There are divers valuable oak, elm, and other timber and timber-like trees growing and standing on the farm and lands comprised in the said Indenture of Mortgage of the 1st of May, 1850, which trees and timber are a material part of the plaintiff's said security; and if the same or any of them were felled and taken away, the said mortgaged premises would be an insufficient security to the plaintiff for the money due thereon.

7. The defendant James Styles, who is in possession of the said farm, has marked for felling a large quantity of the said oak and elm trees and other timber, and he has by hand bills, published on the 2nd of December instant, announced the same for sale, and he threatens and intends forthwith to cut down and dispose of a considerable quantity of the said trees and timber on the said farm.

Prayer.

The plaintiff prays as follows:—

1. That an account may be taken of what is due for principal and interest on the said mortgage.
2. That the defendants, James Styles and Henry Jones, may be decreed to pay to the plaintiff the amount which shall be so found due, together with his costs of this suit, by a short day to be appointed for that purpose, or, in

default thereof, that the defendants, James Styles and Henry Jones, and all persons claiming under them, may be absolutely foreclosed of all right and equity of redemption in or to the said mortgaged premises. Schedule (A).

3. That the defendant James Stiles may be restrained, by the injunction of this Honourable Court, from felling, cutting, or disposing of any of the timber or timber-like trees now standing or growing in or upon the said farm and premises comprised in the said Indenture of Mortgage, or any part thereof.
4. That the plaintiff may have such further or other relief as the nature of the case may require (*b*).

The defendants to this Bill of Complaint are,

James Stiles,
Henry Jones.

Y. Y.,
(name of Counsel.)

Note.—This bill is filed by Messrs. A. B. and C. D., of Lincoln's Inn, in the County of Middlesex, Solicitors for the above-named plaintiff.

[Ord. of 7th August, 1852 ; 1st Set.]

(*b*) This paragraph should be omitted where the bill is for discovery merely, but when it had by mistake been added to such a bill, it was held that it was not alone sufficient to convert the bill into a bill for relief (*South-Eastern Railway Company* v. *Submarine Electric Telegraph Company*, 2 W. R. 31) ; and see further, as to the prayer for general relief, *Hill* v. *The Great Northern Railway Company*, 5 D. M. G. 66, where it was held that under such a prayer relief inconsistent with the allegations in the bill will not be granted ; and see Daniell, 348. Prayer for further relief omitted in bill for discovery only.

SCHEDULE (B). Schedule (B).

[Referred to in the 1st Rule of Order XI.]

Form of Interrogatories (*a*).

In Chancery.

Between John Lee . . . . . Plaintiff.

and

James Styles and Henry Jones . . . . . Defendants.

Interrogatories for the examination of the above-named defendants in answer to the plaintiff's Bill of Complaint.

1. Does not the defendant Henry Jones claim to have some charge upon the farm and premises comprised in the Indenture of

Schedule (B).

Mortgage of the First of May, One thousand eight hundred and fifty, in the plaintiff's Bill mentioned?

(*a*) See *ante*, notes to Ord. XI.

2. What are the particulars of such charge, if any, the date, nature, and short effect of the security, and what is due thereon?

3. Are there, or is there, any other mortgages or mortgage, charges or charge, incumbrances or incumbrance, in any and what manner affecting the foresaid premises, or any part thereof?

4. Set forth the particulars of such mortgages or mortgage, charges or charge, incumbrances or incumbrance; the date, nature, and short effect of the security; what is now due thereon; and who is or are entitled thereto respectively; and when, and by whom, and in what manner, every such mortgage, charge, or incumbrance was created.

The defendant James Styles is required to answer all these interrogatories.

The defendant Henry Jones is required to answer the interrogatories number 1 and 2 (*b*).

Y. Y.,
(name of Counsel).

[Ord. of 7th Aug. 1852; 1st Set.]

(*b*) See *Hughes* v. *Lipscombe*, 3 Hare, 341; *Boutcher* v. *Branscombe*, 5 Beav. 541, under the 16th Order of August, 1841.

Schedule (C).

SCHEDULE (C).

[Referred to in the 1st Rule of Order XV.]

FORM OF ANSWER (*a*).

In Chancery.

Between John Lee . . . . . Plaintiff.

and

James Styles and Henry Jones . . . . . Defendants.

The answer of James Styles, one of the above-named defendants to the Bill of Complaint of the above-named plaintiff.

In answer to the said Bill, I, James Styles, say as follows:—

1. I believe that the defendant Henry Jones does claim to have a charge upon the farm and premises comprised in the Indenture of Mortgage of the First of May, One thousand eight hundred and fifty, in the plaintiff's Bill mentioned.

(*a*) See *ante*, notes to Ord. XV.

Schedule (C).

2. Such charge was created by an Indenture dated the First of November, One thousand eight hundred and fifty, made between myself of the one part, and the said defendant Henry Jones of the other part, whereby I granted and conveyed the said farm and premises, subject to the mortgage made by the said Indenture of the First of May, One thousand eight hundred and fifty, unto the defendant Henry Jones, for securing the sum of Two thousand pounds and interest at the rate of Five pounds per centum per annum, and the amount due thereon is the said sum of Two thousand pounds, with interest thereon, from the date of such mortgage.

3. To the best of my knowledge, remembrance, and belief, there is not any other mortgage, charge, or incumbrance affecting the aforesaid premises.

M. N.,
(name of Counsel).

[Ord. of 7th Aug. 1852; 1st Set.]

SCHEDULE (D).

Schedule (D).

[Referred to in the 15th Rule of Order XXIII.]

FORM OF ORDERING ACCOUNTS AND INQUIRIES.

This Court doth order [and decree] that the following accounts and inquiry be taken and made; that is to say,

1. An account of the personal estate not specifically bequeathed, of A. B., deceased, the testator in the pleadings named, come to the hands of, &c.

2. An account of the testator's debts.

3. An account of the testator's funeral expenses.

4. An account of the testator's legacies and annuities (if any) given by the testator's will.

5. An inquiry what parts (if any) of the testator's said personal estate are outstanding or undisposed of.

And it is ordered, that the testator's personal estate, not specifically bequeathed, be applied in payment of his debts and funeral expenses in a due course of administration, and then in payment of the legacies and annuities (if any) given by his will.

(*If ordered.*)

And it is ordered that the following further inquiries and accounts be made and taken; that is to say,

6. An inquiry what real estate the testator was seised of or entitled to at the time of his death.

7. An account of the rents and profits of the testator's real estate received by, &c.

Schedule (D).

8. An inquiry what incumbrances (if any) affect the testator's real estate, or any and what parts thereof.

(*If Sale ordered.*)

9. An account of what is due to such of the incumbrancers as shall consent to the sale hereinafter directed in respect of their incumbrances.

10. An inquiry what are the priorities of such last-mentioned incumbrances.

11. And it is ordered that the testator's real estate be sold with the approbation of the Judge, &c., &c.

And it is ordered, that the further consideration of this cause be adjourned, and any of the parties are to be at liberty to apply as they may be advised.

[Ord. of 7th Aug. 1852 ; First Set.]

Schedule (E).

SCHEDULE (E).

[Referred to in the 2nd Rule of Order XXVIII.]

Writs of Subpœna.

1.—*Subpœna to hear Judgment.*)

"Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

"To greeting.

We command you [and every of you] that you appear before our Lord High Chancellor [*or*, before his Lordship, *or* Honour the Master of the Rolls, *as the cause may be set down*] on the day of next, or whenever thereafter a certain cause now depending in our High Court of Chancery, wherein A. B. and others, [*or*, another] is [*or*, are] plaintiff [*or*, plaintiffs], and C. D. [and others, *or*, another] is [*or*, are] defendant [*or*, defendants] shall come on for hearing, then and there to receive and abide by such judgment and decree as shall then or thereafter be made and pronounced, upon pain of judgment being pronounced against you in default.

"Witness ourself at Westminster, the day of , in the year of our reign.

"Romilly, M. R."

2.—*Subpœna to testify vivâ voce in Court or before Commissioners to examine witnesses* (*a*), *and subpœna duces tecum.* Schedule (E).

"Victoria," &c.

"To greeting.

"We command you [and every of you] that, laying all other matters aside, and notwithstanding any excuse, you personally be and appear before our Lord High Chancellor [*or*, before his Lordship, *or*, Honour the Master of the Rolls, *or*, before E. F. *or* G. H., Commissioners named in a commission issued to them for that purpose], at such time and place as the bearer hereof shall by notice in writing appoint, to testify the truth according to your knowledge in a certain suit now depending in our High Court of Chancery, wherein A. B. [and others, *or*, another] is [*or*, are] plaintiff [*or*, plaintiffs], and C. D. [and others, *or*, another] is [*or*, are] defendant [*or*, defendants], on the part of the [*in case of subpœna duces tecum, add*, and that you then and there bring with you and produce, *&c.*] And hereof fail not at your peril.

"Witness," &c.

"Romilly, M. R."

(*a*) Commissions for the *examination* of witnesses are dispensed with by sect. 35 of the Chancery Amendment Act, 1852, *ante*, p. 189.

3.—*Subpœna ad testificandum, and subpœna duces tecum.*

"Victoria," &c.

"To greeting.

"We command you [and every of you] that, laying all other matters aside, and notwithstanding any excuse, you personally be and appear before , one of the examiners of witnesses in our High Court of Chancery, at his office in Rolls Yard, Chancery Lane, London, at such time as the bearer hereof shall by notice in writing appoint [*or*, before , the examiner specially appointed for the examination of witnesses in our Chancery, at such times and places as the bearer hereof shall by notice in writing appoint], to testify the truth according to your knowledge in a certain cause depending in our said Court of Chancery, wherein A. B. [and others, [*or*, another] is [*or*, are] plaintiff [*or*, plaintiffs], and C. D. [and others, *or*, another] is [*or*, are] defendant [*or*, defendants], on the part of the [*in case of subpœna duces tecum, add*, and that you then and there bring with you and produce, *&c.*] And hereof fail not at your peril.

"Witness," &c.

"Romilly, M. R."

4.—*Subpœna for Costs.*

"Victoria," &c.

"To greeting.

"We command you [and every of you] that you pay or cause

Schedule (E).

to be paid, immediately after the service of this writ, to or the bearer of these presents, £ costs, ([in a cause wherein A. B. [and others, *or*, another] is [*or*, are] plaintiff [*or*, plaintiffs], and C. D. [and others, *or*, another] is [*or*, are] defendant [*or*, defendants]), [*or* (in the matter of), [*as the case may be*], by our Court of Chancery adjudged to be paid by you, the said , under pain of an attachment issuing against your person, and such process for contempt as the Court shall award in default of such payment.

"Witness," &c.

ROMILLY, M. R."

[Ord of 8th May, 1845.]

5.—*Subpœna to name a Solicitor.*

"Victoria," &c.

"To greeting.

"We command you that, within eight days after the service of this writ on you, exclusive of the day of such service, laying all other matters and excuses aside, you do appear in our High Court of Chancery, and name a solicitor for you in a cause wherein are complainants, and are defendants, and observe what our said Court shall direct in this behalf, upon pain of an attachment issuing against your person, and such other process of contempt as our said Court shall award.

"Witness," &c.

"ROMILLY, M. R."

6.—*Subpœna for an Infant, on coming of Age, to show Cause against Decree* (*b*).

"Victoria," &c.

"To greeting.

"We command you that, within days after the service of this writ on you, exclusive of the day of such service, you do show unto our High Court of Chancery good cause why a certain decree, made by on the day of , in a certain cause, wherein A. B. [and others, *or*, another] is [*or*, are] plaintiff [*or*, plaintiffs], and C. D. [and others, *or*, another] is [*or* are] defendant [*or*, defendants] should not be binding upon you. In default whereof such decree will stand and be absolute against you.

"Witness," &c.

"ROMILLY, M. R."

[Ord of 21st Dec. 1833.]

(*b*) This appears to have been inadvertently included in the Abrogatory Order (I.) of the Orders of 8th May, 1845; but as to the need of naming a day for infants to show cause, since the Trustee Act, 1850, see note (*k*), p. 97, *ante*.

SCHEDULE (F).

Schedule (F).

[Referred to in the 6th Rule of Order XXIX.

Writs of Fieri Facias.

1.—*Writ of Fieri Facias, on a Decree or Order of the Court of Chancery for Payment of Money.*

"Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

"To the Sheriff of greeting.

"We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made the sum of £ , which lately before Us in our High Court of Chancery, in a certain cause [*or*, certain causes, *as the case may be*] wherein A. B. is plaintiff, and C. D. is defendant [*or*, in a certain matter there depending, intituled, 'In the matter of E. F.' *as the case may be*], by a decree [*or*, order, *as the case may be*] of our said Court, bearing date the day of , was decreed [*or*, ordered, *as the case may be*] to be paid by the said C. D. to A. B. And that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made interest upon the said sum of £ at the rate of £4 per centum per annum, from the day of *. And that you have that money and interest before Us in our said Court, immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said decree [*or*, order, *as the case may be*]. And that you do all such things as by the statute passed in the second year of our reign you are authorised and required to do in this behalf. And in what manner you shall have executed this our writ, make appear to us in our said Court immediately after the execution thereof. And have there then this writ.

"Witness ourself at Westminster, the day of in the year of our reign.

"Romilly, M. R."

2.—*Writ of Fieri Facias, on a decree or order of the Court of Chancery for Payment of Money or Interest.*

"Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

"To the Sheriff of greeting.

"We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made the sum of £ and also interest thereon, at the rate of £ per centum per annum, from the day of †, which said sum of money

* The day on which the decree or order was made; or, if that were prior to the 1st of October, 1838, say, "from the 1st day of October, 1838."

† The day mentioned in the order.

Schedule (F).

and interest were lately before Us in our High Court of Chancery, in a certain cause [*or*, certain causes, *as the case may be*] wherein A. B. is plaintiff, and C. D. is defendant [*or*, in a certain matter there depending, intituled, 'In the matter of E. F.,' *as the case may be*], by a decree [*or*, order, *as the case may be*] of our said Court, bearing date the day of , decreed [*or*, ordered, *as the case may be*] to be paid by the said C. D. to A. B. And that you have that money and interest before Us in our said Court immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said decree [*or*, order, *as the case may be*]. And that you do all such things as by the statute passed in the second year of our reign you are authorised and required to do in this behalf. And in what manner you shall have executed this our writ, make appear to us in our said Court immediately after the execution thereof. And have there then this writ.

"Witness," &c.

3.—*Writ of Fieri Facias, on a Decree or Order of the Court of Chancery for Payment of Money and Costs.*

"Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

"To the Sheriff of greeting.

"We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made the sum of £ , which said sum of money was lately before Us in our High Court of Chancery, in a certain cause [*or*, certain causes, *as the case may be*] wherein A. B. is plaintiff, and C. D. is defendant [*or*, in a certain matter there depending, intituled, 'in the matter of E. F.,' *as the case may be*], by a decree [*or*, order, *as the case may be*] of our said Court, bearing date the day of , decreed [*or*, ordered, *as the case may be*] to be paid by the said C. D. to A. B., together with certain costs in the said decree [*or*, order, *as the case may be*] mentioned, and which costs have been taxed and allowed by , one of the Taxing Masters of our said Court, at the sum of £ , as appears by the certificate of the said Taxing Master, dated the day of . And that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made the said sum of £ *, together with interest at the rate of £4 per centum per annum on the said sum of £ †, from the day of ‡, and on the said sum of £ *, from the day of §. And

* The costs.

† The money.

‡ The date of the order; or, if that were prior to the 1st of October, 1838, say, "from the 1st day of October, 1838."

§ The date of the certificate; or, if that were prior to the 1st of October, 1838, say, "from the 1st day of October, 1838."

Schedule (F).

that you have that money and interest before Us in our said Court immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said decree [*or*, order, *as the case may be*]. And that you do all such things as by the statute passed in the second year of our reign you are authorised and required to do in this behalf. And in what manner you shall have executed this our writ, make appear to us in our said Court immediately after the execution thereof. And have there then this writ.

"Witness," &c.

4.—*Writ of Fieri Facias, on a Decree or Order of the Court of Chancery for Payment of Money, Interest and Costs.*

"Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

"To the Sheriff of greeting.

"We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made the sum of £ , and also interest thereon at the rate of £ per centum per annum, from the day of *, which said sum of money and interest were lately before Us in our High Court of Chancery, in a certain cause [*or*, causes, *as the case may be*] wherein A. B. is plaintiff, and C. D. is defendant [*or*, in a certain matter there depending, intituled, 'In the matter of E. F.' [*as the case may be*], by a decree [*or*, order, *as the case may be*] of our said Court, bearing date the day of , decreed [*or*, ordered, *as the case may be*] to be paid by the said C. D. to A. B., together with certain costs in the said decree [*or*, order, *as the case may be*] mentioned, and which costs have been taxed and allowed by one of the Taxing Masters of our said Court, at the sum of £ , as appears by the certificate of the said Taxing Master, dated the day of . And that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made the said sum of £ , together with interest thereon at the rate aforesaid, from the day of †. And that you have that money and interest before Us in our said Court immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said decree [*or*, order, *as the case may be*]. And that you do all such things as by the statute passed in the second year of our reign you are authorised and required to do in this behalf. And in what manner you shall have executed this our writ, make appear to Us in our said Court immediately after the execution thereof. And have there then this writ.

"Witness," &c.

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* The day mentioned in the order.

† The date of the certificate of taxation; or, if that were prior to the 1st of October, 1838, say, "from the 1st day of October, 1838."

Schedule (F).

5.—*Writ of Fieri Facias, on a Decree or Order of the Court of Chancery for Payment of Costs.*

"Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

"To the Sheriff of greeting.

"We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made the sum of £ , for certain costs which were lately, before us in our High Court of Chancery, in a certain cause [*or*, certain causes, *as the case may be*] wherein A. B. is plaintiff, and C. D. is defendant, [*or*, in a certain matter there depending, intituled, 'In the matter of E. F.,' *as the case may be*] by a decree [*or*, order, *as the case may be*] of our said Court, bearing date the day of , decreed [*or*, ordered, *as the case may be*] to be paid by the said C. D. to A. B., and which costs have been taxed and allowed by , one of the Taxing Masters of our said Court, at the said sum of £ , as appears by the certificate of the said Taxing Master, dated the day of . And that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made interest on the said sum of £ , at the rate of £4 per centum per annum from the day of .* And that you have that money and interest before us in our said Court, immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said decree [*or*, order, *as the case may be*]. And that you do all such things as by the statute passed in the second year of our reign you are authorised and required to do in this behalf. And in what manner you shall have executed this our writ, make appear to us in our said Court immediately after the execution thereof. And have there then this writ.

"Witness," &c.

[Ord. of 10th May, 1839.]

Schedule (G).

SCHEDULE (G).

[Referred to in the 6th Rule of Order XXIX.]

Writs of Elegit.

1.—*Writ of Elegit, on a Decree or Order of the Court of Chancery for Payment of Money, or Money and Interest.*

"Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

* The date of the certificate; or, if that were prior to the 1st of October, 1838, say, "from the 1st day of October, 1838."

Schedule (G).

"To the Sheriff of , greeting.

"Whereas, lately in our High Court of Chancery, in a certain cause [*or*, certain causes, *as the case may be*] there depending, wherein A. B. and others are plaintiffs, and C. D. and others are defendants, [*or*, in a certain matter there depending, intituled, 'In the matter of E. F.,' *as the case may be*,] by a decree [*or*, order, *as the case may be*] of our said Court, made in the said cause [*or*, matter, *as the case may be*], and bearing date the day of , it was decreed and ordered [*or*, ordered, *as the case may be*] that the said C. D. should pay unto A. B. the sum of £ [*if interest be given by the order, say* 'together with interest thereon after the rate of £ per centum per annum, from the day of ']. And afterwards, the said A. B. came into our said Court of Chancery, and, according to the form of the statute in such case made and provided, chose to be delivered to him [her, *or*, them, *as the case may be*] all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D. or any one in trust for him, was seised or possessed of on the day of in the year of our Lord *, or at any time afterwards, or over which the said C. D., on the said day of †, or at any time afterwards had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments, respectively, according to the nature and tenure thereof, to him, and to his assigns, until the said sum of £ , together with interest thereon, at the rate of £ per centum per annum, from the said day of †, shall have been levied. THEREFORE WE COMMAND YOU that, without delay, you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said day of *, or at any time afterwards, or over which the said C. D., on the said day of *, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements,

* The day on which the decree or order was made.

† If the order be for money and interest, the day mentioned in the order. If for money only, the day on which the decree or order was made; or in case it was made prior to the 1st day of October, 1838, say, "from the first day of October, 1838."

Schedule (G).

rectories, tithes, rents, and hereditaments, respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £ together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us in our Court of Chancery aforesaid immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

"Witness ourself at Westminster," &c.

"ROMILLY, M. R."

2.—*Writ of Elegit, on a Decree or Order of the Court of Chancery for Payment of Costs.*

"Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

"To the Sheriff of , greeting.

"Whereas, lately in our High Court of Chancery, in a certain cause [*or*, certain causes, *as the case may be*] there depending, wherein A. B. and others are plaintiffs, and C. D. and others are defendants [*or*, in a certain matter there depending, intituled, 'In the matter of E. F.,' *as the case may be*], by a decree [*or*, order, *as the case may be*] of our said Court, made in the said cause [*or*, matter, *as the case may be*], and bearing date the day of , it was decreed and ordered [*or*, ordered, *as the case may be*], that C. D. should pay unto A. B certain costs as in the said decree [*or*, order, *as the case may be*] mentioned, and which costs have been taxed and allowed by , one of the Taxing Masters of our said Court, at the sum of £ , as appears by the certificate of the said Taxing Master, dated the day of . And afterwards the said A. B. came into our said Court of Chancery, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of on the day of , in the year of our Lord *, or at any time afterwards, or over which the said C. D. on the said day of *, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £

* The date of the certificate of taxation.

together with interest thereon at the rate of £4 per centum per annum, from the said day of *, shall have been levied. THEREFORE WE COMMAND YOU, that, without delay, you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands and tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person or persons in trust for him, was or were seised or possessed of on the said day of †, or at any time afterwards, or over which the said C. D., on the said day of †, or at any time afterwards, had any disposing power, which he might, without the assent of any other person or persons, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £ , together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us in our Court of Chancery aforesaid, immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

"Witness ourself at Westminster," &c.

"ROMILLY, M. R."

3.—*Writ of Elegit, on a Decree or Order of the Court of Chancery for Payment of Money and Costs.*

"Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

"To the Sheriff of , greeting.

"Whereas, lately in our High Court of Chancery, in a certain cause [*or*, certain causes, *as the case may be*] there depending, wherein A. B. and others are plaintiffs, and C. D. and others are defendants [*or*, in a certain matter there depending, intituled, 'In the matter of E. F.,' *as the case may be*]. by a decree [*or*, order, *as the case may be*] of our said Court, made in the said cause [*or*, matter, *as the case may be*], and bearing date the day of , it was decreed and ordered [*or*, ordered, *as the case may be*], that C. D. should pay unto A. B. the sum of £ , together with certain costs as in the said decree [*or*, order, *as the case may be*] mentioned, and which costs have been taxed and

* The date of the certificate of taxation; or, if that were prior to the 1st day of October, 1838, say, "from the 1st day of October, 1838."

† The date of the certificate of taxation.

Schedule (G).

allowed by one of the Taxing Masters of our said Court, at the sum of £ , as appears by the certificate of the said Taxing Master, dated the day of . And afterwards the said A. B. came into our said Court of Chancery, and according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of on the day of , in the year of our Lord *, or at any time afterwards, or over which the said C. D. on the said day of *, or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels, as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £ , together with interest upon the said sum of £ at the rate of £4 per centum per annum, from the day of †, and on the said sum of £ at the rate of aforesaid, from the day of ‡, shall have been levied. THEREFORE WE COMMAND YOU that, without delay, you cause to be delivered to the said A. B. by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands and tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person or persons in trust for him, was or were seised or possessed of on the said day of §, or at any time afterwards, or over which the said C. D. on the said day of §, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £ , together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us in our Court of Chancery aforesaid, imme-

* The day on which the decree or order was made.

† The day on which the decree or order was made; or, in case it was made prior to the 1st day of October, 1838, say, "from the 1st day of October, 1838."

‡ The date of the certificate of taxation; or, if that were prior to the 1st day of October, 1838, say, "from the 1st day of October, 1838."

§ The day on which the decree or order was made.

diately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ. Schedule (G).

"Witness ourself at Westminster, &c.

"ROMILLY, M. R."

4.—*Writ of Elegit, on a Decree or Order of the Court of Chancery for Payment of Money, Interest, and Costs.*

"Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

"To the Sheriff of greeting.

"Whereas, lately in our High Court of Chancery, in a certain cause [*or*, certain causes, *as the case may be*] there depending, wherein A. B. and others are plaintiffs, and C. D. and others are defendants [*or*, in a certain matter there depending, intituled, 'In the matter of E. F.,' *as the case may be*] by a decree [*or*, order, *as the case may be*] of our said Court, made in the said cause [*or*, matter, *as the case may be*] and bearing date the day of , it was ordered and decreed [*or*, ordered, *as the case may be*] that C. D. should pay unto A. B. the sum of £ , together with interest thereon, after the rate of £ per centum per annum, from the day of , together also with certain costs, as in the said decree [*or*, order, *as the case may be*] mentioned, and which costs have been taxed and allowed by , one of the Taxing Masters of our said Court, at the sum of £ as appears by the certificate of the said Taxing Master, dated the day of . And afterwards the said A. B. came into our said Court of Chancery, and according to the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D. or any one in trust for him was seised or possessed of on the day of in the year of our Lord *, or at any time afterwards, or over which the said C. D. on the said day of *, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £ , together with interest upon the said sum of £ at the rate of £ per centum per annum, from

* The day on which the decree or order was made.

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the said day of *, and on the said sum of £ at the rate of £4 per centum per annum, from the day of †, shall have been levied. THEREFORE WE COMMAND YOU, that without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands and tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person or persons in trust for him, was or were seised or possessed of on the said day of ‡, or at any time afterwards, or over which the said C. D. on the said day of ‡, or at any time afterwards had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £ , together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us in our Court of Chancery aforesaid, immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

"Witness ourself at Westminster," &c.

"ROMILLY, M. R."

[Ord. of 10th May, 1839.]

Schedule (H).

SCHEDULE (H).

[Referred to in the 9th Rule of Order XXIX.]

WRIT OF VENDITIONI EXPONAS.

"Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

"To the Sheriff of greeting.

"Whereas by our writ we lately commanded you that of the goods and chattels of C. D. [*here recite the Fieri Facias to the end*].

* The day mentioned in the decree or order.

† The date of the certificate of taxation; or, if that were prior to the 1st of October, 1838, say, "from the 1st day of October, 1838."

‡ The day on which the decree or order was made.

Schedule (H).

And on the day of you returned to us in our Court of Chancery aforesaid, that by virtue of the said writ to you directed, you had taken goods and chattels of the said C. D. to the value of the money and interest aforesaid, which said goods and chattels remained in your hands unsold for want of buyers. THEREFORE, we being desirous that the said A. B. should be satisfied his money and interest aforesaid, command you, that you expose to sale or sell and cause to be sold the goods and chattels of the said C. D. by you in form aforesaid taken and every part thereof, for the best price that can be gotten for the same, and have the money arising from such sale before us in our said Court of Chancery aforesaid, immediately after the execution hereof, to be paid to the said A. B. And have there then this writ.

"Witness ourself at Westminster, the day of in the year of our reign.

"ROMILLY, M. R."

[Ord. of 10 May, 1839].

SCHEDULE (J).

Schedule (J). No. I.

[Referred to in the 11th Rule of Order XXIX.]

No. 1.

WRIT OF FIERI FACIAS DE BONIS ECCLESIASTICIS.

"VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the Right Reverend Father in God (JOHN), by Divine Permission Lord Bishop of greeting. We command you that of the ecclesiastical goods of C. D., Clerk in your diocese, you cause to be made £ , which lately before us in our Court of Chancery, in a certain cause [*or*, certain causes, *as the case may be*], wherein A. B. is plaintiff and C. D. is defendant [*or*, in a certain matter there depending, intituled, 'In the matter of E. F.,' *as the case may be*], by a decree [*or*, order, *as the case may be*], of our said Court, bearing date the day of was decreed [*or*, ordered, *as the case may be*], to be paid by the said C. D. to the said A. B., together with interest on the said sum of £ , at the rate of £ per centum per annum from the day of , and have that money, together with such interest as aforesaid, before us in our said Court, immediately after the execution hereof, to be rendered to the said A. B., for that our sheriff of returned to us in our said Court on [*or*, 'at a day now past'], that the said C. D. had not any goods or chattels, or any lay fee, in his bailiwick, whereof he could cause to be made the said £ and interest aforesaid or any part

Schedule (J). No. I.

thereof, and that the said C. D. was a beneficed Clerk (to wit) Rector of the Rectory [*or*, Vicar of the Vicarage] and Parish Church of in the said Sheriff's county, and within your diocese [*as in the return*]; and in what manner you shall have executed this our writ make appear to us in our said Court, immediately after the execution hereof, and have you there then this Writ. Witness ourself at Westminster, the day of , in the year of our Lord

"Romilly, M. R."

[Ord. of 18th July, 1857].

No. II.

No. II.

Writ of Fieri Facias to the Archbishop, de Bonis Ecclesiasticis, during the Vacancy of a Bishop's See.

"Victoria [&c., *as in the preceding form*], To the Right Reverend Father in God [John], by Divine Providence Lord Archbishop of Canterbury, Primate of All England and Metropolitan, greeting. We command you, that of the ecclesiastical goods of C. D., Clerk, in the diocese of , which is within the province of Canterbury, as Ordinary of that Church, the Episcopal See of now being vacant, you cause to be made" [&c.: *Conclude as in the preceding form*].

[18th July, 1857].

No. III.

No. III.

Writ of Sequestrari Facias de Bonis Ecclesiasticis.

"Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, To the Right Reverend Father in God (John), by Divine Permission Lord Bishop of , greeting. Whereas we lately commanded our Sheriff of , that he should omit not by reason of any liberty of his county, but that he should enter the same, and cause [to be made, *if after the return to a Fieri Facias, or*, delivered, *if after the return to an Elegit, &c., and in either case recite the former Writ*]. And whereupon our said Sheriff of , on [*or*, 'at a day past'], returned to us in our said Court of Chancery that the said C. D. was a beneficed Clerk, that is to say, Rector of the Rectory [*or*, Vicar of the Vicarage] and Parish Church of , in the county of , and within your diocese, and that he had not any goods or chattels, or any lay fee, in his bailiwick [*here follow the words of the Sheriff's return*]. Therefore we command you that you enter into the said Rectory [*or*, Vicarage] and Parish Church of , and take and sequester the same into your possession, and that you hold the same in your possession until you shall have levied

Schedule (J). No. III.

the said £ and interest aforesaid of the rents, tithes, rent-charges in lieu of tithes, oblations, obventions, fruits, issues, and profits thereof, and other ecclesiastical goods in your diocese, of and belonging to the said Rectory [*or*, Vicarage] and Parish Church of , and to the said C. D. as Rector [*or*, Vicar] thereof, to be rendered to the said A. B. ; and what you shall do therein make appear to us in our said Court immediately after the execution hereof; and have you there then this writ. Witness ourself at Westminster, the day of , in the year of our Lord

"ROMILLY, M. R."

Indorse it as a Fi. Fa.: After the words "expenses of the execution," *add,* "and sequestration."

[Ord. of 18th July, 1857.]

SCHEDULE (K).

Schedule (K). No. I.

SUMMONSES (*a*).

No. I.

Form of General Summons.

[Referred to in the 2nd Rule of Order XXXV. and in the 10th Rule of Order XLI.]

In Chancery.

In the Matter of John Thomas, an Infant,

or,

Between Joseph Wilson . . . Plaintiff,
and
William Jackson . . . Defendant.

Let all parties concerned attend at my Chambers [in the Rolls Yard, Chancery Lane, Middlesex], [*or*, at No. —, —— Square, Lincoln's Inn, Middlesex], on the day of , at of the clock in the noon, on the hearing of an application on the part of [*here state on whose behalf the application is made, and the precise object of the application*].

Dated this day of 1860.

JOHN ROMILLY, Master of the Rolls,

or,

X. Y., Vice-Chancellor.

This summons was taken out by A. and B. of Lincoln's Inn, in the county of Middlesex, solicitors for

To

Schedule (K). No. I.

The following Note to be added to the original summons where proceedings originate in Chambers; and when the time is altered by indorsement, the indorsement to be referred to as below.

NOTE.—If you do not attend, either in person or by your solicitor, at the time and place above mentioned [*or*, at the place above mentioned, at the time mentioned in the indorsement hereon], such order will be made, and proceedings taken, as the Judge may think just and expedient.

[Ord. of 16th October, 1852.]

(*a*) As to preparing and sealing the summons, filing a duplicate, and serving a stamped copy, and also as to appearance on the summons, see Ord. XXXV. 5, 9, *ante*.

No. II.

No. II.

Form of Administration Summons (*b*).

[Referred to in the 3rd Rule of Order XXXV.]

In Chancery.

In the Matter of the Estate of John Thomas, late of the Parish of A., in the County of B., deceased.

Between Joseph Wilson . . . . Plaintiff,
and
William Jackson . . . Defendant.

Upon the application of Joseph Wilson, of Russell Square, in the county of Middlesex, Esq., who claims to be a creditor upon the estate of the above-named John Thomas, let William Jackson, the executor of the said John Thomas, attend at my Chambers [in Rolls Yard, Chancery Lane, Middlesex], [*or*, at No. —, —— Square, Lincoln's Inn, Middlesex,] on the day of , at of the clock in the noon, and show cause, if he can, why an order for the administration of the personal [*or*, real and personal] estate of the said John Thomas, by the High Court of Chancery, should not be granted.

Dated the day of 1860.

JOHN ROMILLY, Master of the Rolls,
or,
X. Y., Vice-Chancellor.

This summons was taken out by A. and B., of Lincoln's Inn, in the County of Middlesex, solicitors for the above-named Joseph Wilson.

The following Note to be added to the original summons; and when the time is altered by indorsement, the indorsement to be referred to as below.

NOTE.—If you do not attend, either in person or by your

solicitor, at the time and place above mentioned [*or*, at the place above mentioned, at the time mentioned in the indorsement hereon], such order will be made, and proceedings taken, as the Judge may think just and expedient. Schedule (K). No. II.

[Ord. of 7th Aug. 1852, 1st Set.]

(*b*) As to administration summons, see pp. 202—5, *ante*.

No. III. No. III.

Form of Summons by Chief Clerk (*c*).

[Referred to in the 4th Rule of Order XXXV.]

In Chancery.

In the Matter of the Estate of John Thomas, late of , in the county of , deceased,

or,

Between Joseph Wilson . . . . Plaintiff,

and

William Jackson . . . . Defendant.

The defendant, William Jackson [*or*, A. B., of, &c.], is hereby summoned to attend at the Chambers of the Master of the Rolls [*or*, Vice-Chancellor], in the Rolls Yard, Chancery Lane [*or*, No. —, —— Square, Lincoln's Inn, Middlesex], on the day of , at of the clock in the noon, to be examined [*or*, to be examined as a witness] on the part of the for the purpose of the proceedings directed by the Master of the Rolls [*or*, the said Vice-Chancellor] to be taken before me.

Dated this day of , 1860.

A. B.
Chief Clerk.

This summons was taken out by A. and B. of Lincoln's Inn, in the county of Middlesex, solicitors for

[Ord. of 16th Oct. 1852.]

(*c*) See p. 151, *ante*, and note (*a*), *supra*.

SCHEDULE (L). Schedule (L).

[Referred to in the 37th Rule of Ord. XXXV.]

Form of Advertisement (*a*).

Pursuant to a decree [*or*, order] of the High Court of Chancery, made in [the matter of the estate of , and in] a cause

against

the creditors of [*or*, the person claiming debts or liabilities affect-

Schedule (L).

ing the estate of, *or* the persons claiming to be next of kin to, *or* the heir of, *as the case may be*], late of in the county of , who died in or about the month of , are by their solicitors, on or before the day of , to come in and prove their debts [*or*, claims] at the Chambers of the Master of the Rolls, in the Rolls Yard, Chancery Lane [*or*, of the Vice-Chancellor , No. —, —— Square, Lincoln's Inn], Middlesex, or in default thereof they will be peremptorily excluded from the benefit of the said decree [*or*, order].

[Monday] the day of at o'clock in the noon, at the said Chambers, is appointed for hearing and adjudicating upon the claims.

Dated this day of , 1860.

A. B.
Chief Clerk.

[Ord. of 16th October, 1852.]

(*a*) See now for form of advertisement for creditors the second schedule annexed to Ord. XXVII., May, 1865, *ante*.

Schedule (M).

SCHEDULE (M).

[Referred to in the 48th Rule of Ord. XXXV.]

Form of Certificate of Chief Clerk (*a*).

In the Matter of , [*or*, Between]. [*State title.*] In pursuance of the directions given to me by the Master of the Rolls [*or*, the Vice-Chancellor], I hereby certify, that the result of the accounts and inquiries which have been taken and made, in pursuance of the decree [*or*, order] in this cause, dated the day of , is as follows:

1. The defendants, the executors of , the testator, have received personal estate to the amount of £ , and they have paid, or are entitled to be allowed on account thereof, sums to the amount of £ , leaving a balance due from [*or*, to] them of £ , on that account.

The particulars of the above receipts and payments appear in the account marked verified by the affidavit of , filed on the day , and which account is to be filed with this certificate: except that in addition to the sums appearing on such account to have been received, the said defendants are charged with the following sums [*state the same here, or in a schedule*], and except that I have disallowed the items of disbursement in the said account numbered and

[*Or, in cases where a transcript has been made.*]

The defendants have brought in an account verified by the affidavit of , filed on the day

Schedule (M).

of , and which account is marked , and is to be filed with this certificate. The account has been altered, and the account marked , and which is also to be filed with this certificate, is a transcript of the account as altered and passed.

2. The debts of the testator which have been allowed are set forth in the Schedule hereto, and with the interest thereon and costs mentioned in the Schedule, are due to the persons therein named, and amount altogether to £

3. The funeral expenses of the testator amount to the sum of £ , which I have allowed the said executors in the said account of personal estate.

4. The legacies given by the testator are set forth in the Schedule hereto, and with the interest therein mentioned remain due to the persons therein named, and amount altogether to £ .

5. The outstanding personal estate of the testator consists of the particulars set forth in the Schedule hereto.

6. The real estate to which the testator was entitled consists of the particulars set forth in the Schedule hereto.

7. The defendants have received rents and profits of the testator's real estate, &c. [*in a form similar to that provided with respect to the personal estate*].

8. The incumbrances affecting the said testator's real estate are specified in the Schedule hereto.

9. The real estates of the testator directed to be sold have been sold, and the purchase monies, amounting altogether to £ , have been paid into court.

N.B.—The above numbers are to correspond with the numbers in the decree.

After each statement the evidence produced is to be stated as follows:—

The evidence produced on this account [*or*, inquiry] consists of the probate of the testator's will, the affidavit of A. B. filed , and paragraph No. of the affidavit of C. D. filed.

[Ord. of 16th October, 1852.]

(*a*) See generally for form of chief clerk's certificate, note (*q*), p. 153, *ante*.

SCHEDULE (N).

Schedule (N).

[Referred to in Ord. XLI., § IV.]

Forms connected with Juries.

1. *Form of Record for Trial of a Question or Questions of Fact.*

In Chancery.

Title of Cause or Matter.

By an order made in this cause [*or*, matter], dated, &c., the

Schedule (N).

Court hath directed that the following question [*or*, questions] of fact be tried by a jury before the Court itself [*or*, before the Court itself without a jury] (that is to say):

Whether, &c.

N.B.—If more questions than one, number them consecutively 1, 2, 3, &c.

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2. *Form of Record for Trial as to amount of Damages.*

In Chancery.

Title of Cause or Matter.

Whereas, by an Order made in this cause [*or*, matter], dated, &c., the Court hath awarded damages to in respect of the matters in the said Order mentioned, and hath directed that the amount of such damages shall be assessed by a jury before the Court itself [*or*, before the Court itself without a jury].

The question is, what amount of damages the plaintiff hath sustained by reason of the matters in the said Order mentioned.

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3. *Form of Order to summon a Common Jury.*

In Chancery.

Title of Cause or Matter.

Upon the humble petition of [*or*, upon motion this day made, &c.]

It is ordered that the Sheriff of Middlesex do summon a sufficient number of common jurors for the trial of a certain question [*or*, certain questions] of fact [*or*, as to the amount of damages sustained by] to be tried before the Right Honourable the Lord High Chancellor in his Court at Lincoln's Inn Hall, in the county of Middlesex [*or other the Judge before whom and the Court in which the trial is to take place*], on the day of , 186 , at Ten of the clock in the forenoon precisely. And it is ordered that the said Sheriff do attend with the said jurors accordingly.

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4. *Form of Order for a Special Jury.*

Title of Cause or Matter.

Upon the humble petition, &c.

It is ordered that at the expense of the plaintiff [*or*, defendant, *or*, petitioner, *or*, respondent] in the first instance, forty-eight special jurors be nominated by ballot out of the special jurors' list for the county of , of persons qualified to serve on special juries for the said county, and be reduced before the Under Sheriff of the said county; and that twelve of them be

struck out by each party, and that the names of the remaining twenty-four be placed on a panel for the trial of a certain question [*or*, certain questions] of fact [*or*, as to the amount of damages sustained by] in this cause [*or*, matter], and that the said Sheriff of the said county do cause the said twenty-four jurors to be summoned to attend at the said trial on, &c. [*as in preceding form*], and that the said Sheriff do also summon twelve common jurors to attend at the said trial on the day and at the time and place aforesaid. And it is ordered that the said Sheriff and the said jurors do attend accordingly.

N.B. If special jury, obtained on the application of either party without the special direction of the Court, leave out the words "in the first instance."

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5. *Form of Order for a View* (*a*).

In Chancery.

Title of Cause or Matter.

Upon application, &c.

It is ordered that the Sheriff of do cause the place in question to be shown to six or more of the jury [*or*, *if a special jury*, say, six or more of the first twelve jurors] summoned and impanelled to try the question [*or*, questions] between the said parties, or as many more of such jurors as he shall think fit, in order that they may take a view of the place in question, on the day of next, at of the clock in the forenoon of the same day; and that the said jurors do meet at the house of I. P., known by the name or sign of , at in the county [*or*, city] of , and then and there be refreshed at the equal charge of the said parties; and that S. P. on the part of the plaintiff [*or*, petitioner], and S. D. on the part of the defendant [*or*, respondent] do show the place in question to those jurors; but that no evidence be then and there given to the said jurors. And it is ordered that the Sheriff of do return the names of such of the said jurors as shall view the said place to the Registrar in the Court of Chancery, for the purpose of their being called as jurymen upon the trial of the said question [*or*, questions]. And it is further ordered that the plaintiff [*or*, defendant, *or*, petitioner, *or*, respondent], his solicitor or agent, do deposit in the hands of the Under Sheriff of the said county, the sum of £ for payment of the expenses of the said view, pursuant to the General Order of Court in that behalf made; and that if such sum shall be more than sufficient to pay the expenses of the said view, the surplus be forthwith returned to the plaintiff's [*or*, defendant's, *or*, petitioner's, *or*, respondent's] solicitor; and if such sum shall not be sufficient to pay such expenses, the deficiency be paid forthwith by such solicitor to the said Under Sheriff: the plaintiff [*or*, defendant, *or*, petitioner, *or*, respondent] by his solicitor consenting that in case no view shall

Schedule (N).

be had, or if a view shall be had by any of the said jurors, whether they shall happen to be six or any particular number of the jurors who shall be mutually consented to, yet the said trial shall proceed, and no objection shall be made on account thereof.

(*a*) See Ord. XLI. 36, *ante*, and for the deposit to be made by the applicant, and the fees to the jurymen and under-sheriff and bailiff, according to the distance, see *ibid*, r. 37, *ante*.

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6. *Form of Notice to Admit* (*b*) *and Inspect.*

In Chancery.

Title of Cause or Matter.

Take notice that the plaintiff [*or*, defendant, *or*, petitioner, *or*, respondent] proposes to adduce in evidence on the trial in this cause [*or*, matter] the several documents hereunder specified, and that the same may be inspected by the defendant [*or*, plaintiff, *or*, respondent, *or*, petitioner], his solicitor, or agent at , on , between the hours of , and the defendant [*or*, plaintiff, *or*, respondent, *or*, petitioner] is hereby required within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals, were respectively written, signed, or executed as they purport respectively to have been; that such as are specified as copies are true copies; and that such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence on such trial. Dated, &c.

To E. F., solicitor. G. H., solicitor.

[*or*, agent] for { defendant, / plaintiff, / respondent, / *or* / petitioner. } [*or*, agent] for { plaintiff, / defendant, / petitioner, / *or* / respondent. }

Here describe the documents: the description may be as follows:—

ORIGINALS.

Description of the Documents.	Date.
Deed of Covenant between A. B. & C. D., 1st part, and E. F., of the 2nd part . .	1st January, 1848.
Indenture of Lease from A. B. to C. D. . .	1st February, 1848.
Indenture of Release between A. B. & C. D., 1st part, &c.	2nd February, 1848.
Letter from Defendant to Plaintiff . . .	1st March, 1848.
Policy of Insurance on Goods . . .	3rd December, 1848.
Bill of Exchange for £100 at 3 months drawn by A. B. on and accepted by C. D., indorsed by E. F. and G. H. . . .	1st May, 1840.

Schedule (N).

COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered, when, how, and by whom.
Register of Baptism of A. B. in the parish of X. . . .	1st January, 1808	
Letter from Plaintiff to Defendant . .	1st February, 1848	Sent by General Post, 2nd Feb., 1848.
Notice to produce Papers . . .	1st March, 1848	Served 2nd Mar., 1848, on Defendant's Attorney by E. F. of
Letters Patent of King Charles Second in the Rolls Chapel.	1st January, 1680	

(*b*) See 21 & 22 Vict. c. 27, sect. 7, *ante*, which provides that any party may call on another to admit any document saving just exceptions.

As to administrations of documents made *by agreement between the solicitors* on either side, see Daniell, 785 ; and for forms of such administrations, Daniell III. 785.

7. *Form of oath to be administered to the Jurors.*

You shall well and truly try the question [*or*, questions] between the parties, and a true verdict give according to the evidence. So help you God.

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8. *Form of oath to be administered to a Witness.*

The evidence you shall give to the Court and Jury [*or*, the Court, *as the case may be*] touching the matters in question, shall be the truth, the whole truth, and nothing but the truth. So help you God.

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9. *Form in case the Witness has a conscientious Objection to take an oath.*

The witness is to repeat, after the Registrar, as follows, verbatim :

I (*A.B.*) do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful. And I do also solemnly and truly affirm and declare that the evidence I shall give to the Court and Jury [*or*, the Court, *as the case may be*], shall be the truth, the whole truth, and nothing but the truth.

Schedule (N).

10. *Form of oath to be taken by the Usher of the Court, on Jury retiring to consider their Verdict.*

You shall well and truly keep this jury in some private and convenient place, without meat, drink, or fire (candle light excepted). You shall not suffer any person to speak to them, neither shall you speak to them yourself, without leave of the Court, except to ask them if they are agreed on their verdict.

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11. *Form of Writ of Inquiry before the Sheriff.*

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the Sheriff of greeting.

Whereas, by an Order of His Honour the Master of the Rolls, made in this cause [*or*, matter] dated, &c., His Honour awarded damages to be recovered by A. B. against the said C. D., in respect of, &c. (*take words from the Order*). But because it is unknown to our said Court what damages the said A. B. hath sustained by means of the premises aforesaid, therefore We command you, that by the oath of twelve good and lawful men of your bailiwick [*if by a special jury, add here the words* "qualified to serve as special jurors, such jury to be struck and reduced according to law"], you diligently inquire what damages the said A. B. hath sustained by reason of the premises aforesaid; and that you send to Us, in our Court of Chancery aforesaid, on the day of , the inquisition which you shall thereupon take under your seal, and the seals of those by whose oath you shall take that inquisition, together with this writ.

Witness Ourself at Westminster, the day of , in the year of our reign.

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12. *Form of Writ of Inquiry to a County Palatine.*

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To our Chancellor of our county palatine of Lancaster, or to his deputy there, greeting.

Whereas [*as in preceding form*]. But because it is unknown to our said Court what damages the said A. B. hath sustained by means of the premises aforesaid, therefore We command you, that by our writ, under the seal of our said county palatine, to be duly made and directed to the Sheriff of the same county, you command the said Sheriff, that by the oath of twelve good and lawful men

Schedule (N).

of his bailiwick [*if by a special jury, add the words as in preceding form*], he diligently inquire what damages the said A. B. hath sustained by means of the premises aforesaid, and that you send to Us in our said Court of Chancery, on the day of , the inquisition which the said Sheriff shall thereupon take under his seal, and the seals of those by whose oath he shall take that inquisition, together with this writ.

Witness Ourself at Westminister, the day of , in the year of our reign.

---

13. *Form of Inquisition on Writ of Inquiry.*

To wit.

An inquisition taken at the house of , called or known by the name or sign of the , in the said county of , on the day of , in the year of the reign of our Sovereign Lady Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, and in the year of our Lord 18 , before , Esquire, Sheriff of the county aforesaid, by virtue of a writ of our Sovereign Lady the Queen, to the said Sheriff directed, and to this inquisition annexed, to inquire of certain matters in the said writ specified by the oaths of , twelve honest and lawful men of the said county, who upon their oaths say that in the said writ named hath sustained damages to the sum of £ by the means in the said writ mentioned.

In witness whereof, as well I the said Sheriff, as the jurors aforesaid, have hereunto set our hands and seals the day and year and place above mentioned.

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14. *Form of Writ of Inquiry of Damages to be executed before the Justice of Assize.*

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the Sheriff and to our Justices assigned to take the Assizes in and for the county of , greeting.

Whereas [*as in the foregoing forms*]. But because it is unknown to our said Court what damages the said A. B. hath sustained by means of the premises aforesaid, therefore, according to the statute in such case made and provided, We command you, the said Sheriff, that you summon twelve good and lawful men of your bailiwick [*if by a special jury, add here the words* "qualified to serve on special juries, such jury to be struck and reduced

Schedule (N).

according to law"], to appear before our said Justices of Assize, on the day of , at in the said county, by Ten of the clock in the forenoon of that day, to diligently inquire, and on their oath to assess the damages which the said A. B. hath sustained by means of the premises aforesaid; and that you, the said Sheriff, have on that day before the said Justices of Assize this writ. We likewise command our said Justices that they certify the inquisition before them taken, to Us in our Court of Chancery at Westminster, on the day of next, together with the names of those by whose oath such inquisition shall be taken, and that they also have then there this writ.

Witness Ourself at Westminster, the day of , in the year of our reign.

Campbell, C.
John Romilly, M. R.
J. L. Knight Bruce, L. J.
G. J. Turner, L. J.
Rich. T. Kindersley, V.-C.
John Stuart, V.-C.
W. P. Wood, V.-C.

Hilary Term, 1860.

REGULATIONS

As to Special Examiners' Fees and Charges, Solicitors' Fees and Charges, Court Fees, and Charges for Copies (a).

Regulations as to Fees, 1860.

I. Regulation as to Special Examiners' Fees and Charges.

Special Examiners' Fees and Charges.

An examiner specially appointed by the Court shall, for the performance of his duty, be entitled to receive the sums of money set forth in the First Schedule hereto (8th May, 1845; Ord. 110).

(a) See Orders XXXVI., XXXVIII., XXXIX, and XL., on Copies, Fees, Costs, Charges, and Expenses.

II. Regulations as to Solicitors' Fees and Charges.

Solicitors' Fees and Charges.

1. Solicitors shall be entitled to charge and be allowed the fees set forth in the column headed "Lower Scale" in the Second Schedule hereto, in the several cases following, unless the Court shall make order to the contrary; that is to say (b),

1. Lower scale of solicitors' fees.

1st. In all suits by creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs at law or next of kin, in which the personal or real, or personal and real estate, for or against or in respect of which, or for an account or administration of which, the demand may be made, shall be under the amount or value of £1000 (c).

2ndly. In all suits for the execution of trusts in which the trust estate or fund shall be under the amount or value of £1000.

3rdly. In all suits for foreclosure or redemption, or for enforcing any charge or lien, in which the mortgage whereon the suit is founded, or the charge or lien sought to be enforced, shall be under the amount or value of £1000.

4thly. In all suits for specific performance, in which the purchase-money or consideration shall be under the amount or value of £1000.

5thly. In all proceedings under the Trustees Relief Acts, or under the Trustee Acts, or under any of such Acts, in which the trust estate or fund to which the proceeding relates shall be under the amount or value of £1000.

Regulations as to Fees, 1860.

Solicitors' Fees.

6thly. In all proceedings relating to the guardianship or maintenance of infants, in which the property of the infant shall be under the amount or value of £1000.

7thly. In all proceedings by special case, and in all proceedings relating to funds carried to separate accounts, and in all proceedings under any railway or private Act of Parliament, or under any other statutory or summary jurisdiction, and generally in all other cases where the estate or fund to be dealt with shall be under the amount or value of £1000 (30th Jan. 1857 ; Ord. 2) (*b*).

Higher Scale in cases of fraud, &c.

1000*l.* how reckoned.

(*b*) The lower scale does not apply to suits involving such questions as equitable fraud. See *Earl of Stamford* v. *Dawson*, 15 W. R. 396 ; *Grimes* v. *Harrison*, 27 Beav. 198.

(*c*) In estimating the 1000*l.* the Court looks to the amount in dispute when the bill is filed, not to the amount recovered. See *Flockton* v. *Peake*, 12 W. R. 1025 ; *Re Reece*, 2 L. R. Eq. 609 ; but when an estate, originally large, has been reduced by proper payments to below 1000*l.* before the suit was instituted, the lower scale applies, *ibid.* and see *Judd* v. *Plum*, 29 Beav. 21 ; *secus*, if the bill seek other relief, although the fund in question is under 1000*l.*, *Grimes* v. *Harrison*, l. c.

2. Higher scale of solicitors' fees.

2. In all other cases (*d*) solicitors shall be entitled to charge and be allowed the fees set forth in the column headed "Higher Scale" in the Second Schedule hereto, unless the Court shall make order to the contrary as to all or any of the parties (30th Jan. 1857 ; Ord. 3).

Other suits where lower scale applies.

(*d*) See *Reade* v. *Bentley*, 3 K. & J. 271. But in an interpleader suit before V.-C. Kindersley (*Gibbs* v. *Gibbs*, 6 W. R. 415), where there was an actual fund under 1000*l.* to be dealt with, it was held that the lower scale applied.

The principle of these rules is not affected by the circumstance that Court fees have been paid on the certificate of the plaintiff's solicitor during the progress of the suit on the lower scale, *Flockton* v. *Peake*, 12 W. R. 1023. See Rule 5, next page.

3. Fees for perusing, &c. abstracts and drafts.

3. Solicitors shall also be entitled to charge and be allowed the fees set forth in the Third Schedule hereto (30th Jan. 1857 ; Ord. 1).

Regulations as to Court Fees.

III. Regulations as to Court Fees.

1. Reference to fourth schedule.

1. The fees of Court (*e*) shall be those set forth in the Fourth Schedule hereto (30th Jan. 1857 ; Ord. 4).

(*e*) See Ord. XXXIX., 2, 3, *ante*.

2. Scale of Court fees.

2. The fees set forth in the column headed "Lower Scale" in the Fourth Schedule hereto shall be paid in all cases in which the Lower Scale of fees is to be charged by and allowed to solicitors, under the provisions of these regulations ; and the fees of Court set forth in the column headed "Higher Scale" in the Fourth Schedule hereto shall be paid in all other cases (30th Jan. 1857 ; Ord. 4).

3. The solicitor or party instituting any proceeding in respect of which he claims to pay the fees of Court according to the Lower Scale shall file with the Clerk of Records and Writs a certificate in the form hereunder set forth, of which certificate the Clerk of Records and Writs shall, at the request of any solicitor or any party acting in person in the suit or matter, mark a copy (30th Jan. 1857 ; Ord. 4) (*f*).

Regulations as to Fees, 1860.

Court Fees.

3. Certificate for lower scale.

(*f*) The copy must be left on bespeaking the decree. See 20th Registr. Regul., March, 1860, p. lxxxiii. *post.*

4. On production of such copy of the certificate, the officers of the Court shall receive and file all proceedings in the suit or matter bearing stamps according to the Lower Scale (30th Jan. 1856 ; Ord. 4).

5. In any case certified for the Lower Scale of Court Fees in which it shall happen that the solicitor shall become entitled to charge and be allowed according to the Higher Scale of solicitors' fees, the deficiency in the fees of Court shall be made good (30th Jan. 1857 ; Ord. 4).

6. In any case in which the fees of Court have been paid upon the Higher Scale, and in which it shall happen that the solicitor shall become entitled to charge and be allowed only according to the Lower Scale of solicitor's fees, the excess of fees of Court so paid may be allowed upon the taxation of costs, if the circumstances of the case shall, in the judgment of the Taxing Master, justify such allowance (30th Jan. 1857 ; Ord. 4).

7. The stamps for denoting the payment of fees of Court shall be of the amounts set forth in the Fifth Schedule hereto.

4. On production thereof proceedings to be filed, bearing stamps, according to lower scale.

5. Where solicitor entitled to higher scale, deficiency of court fees to be made good.

6. Where solicitor entitled to lower scale, excess of court fees to be allowed.

7. Stamps.

Form of Certificate for paying the Lower Scale of Court Fees.

(Title of Cause or Matter.)

I hereby certify, that, to the best of my judgment and belief, the Lower Scale of fees of Court is applicable to this case. Dated, &c.

A. B.
Solicitor for

IV. Regulations as to Charges for Copies delivered by Parties and Solicitors.

Regulations as to Charges for Copies delivered by Parties and Solicitors.

1. The charges for all copies delivered by parties or solicitors under the 3rd, 4th, and 5th Rules of the 36th of the Consolidated General Orders shall be at the rate of fourpence per folio, except in the cases next hereinafter mentioned (25th Oct. 1852 ; Ord. 1, Art. 5) (*g*).

1. General rule as to charges for copies.

(*g*) See Ord. XXXVI. 1, *ante.* Where documents are produced at a solicitor's office for his convenience he may only charge stationers' charges for copies of them, note (*o*), p. 172, *ante.*

Regulations as to Fees, 1860.

Charges for Copies.

2, 3. In case of a person suing or defending in formâ pauperis.

2. The charges for copies of pleadings, and other proceedings and documents delivered under the 3rd, 4th, and 5th Rules of the 36th of the Consolidated General Orders, to a person admitted to sue or defend *in formâ pauperis*, or to his solicitor, by or on behalf of any other party, shall be at the rate of one penny-halfpenny per folio. Provided always, that if such person shall become entitled to receive dives costs, the charges for such copies shall be at the rate of fourpence per folio ; and nothing shall be allowed in taxation in respect of such charges, until such person or his solicitor shall have paid or tendered to the solicitor or party by whom such copies were delivered, the additional twopence-halfpenny per folio. But this proviso shall not apply to any copy which shall have been delivered by the party himself who is directed to pay the costs, and not by his solicitor (1st June, 1854 ; Ord. 9).

3. The charges for copies delivered by a person admitted to sue or defend *in formâ pauperis*, other than those delivered by his solicitor, shall be at the rate of one penny-halfpenny per folio (1st June, 1854 ; Ord. 10).

4. Length of folio.

4. All office copies and other copies of pleadings, proceedings, and documents in the Court of Chancery shall (except in the case of transcripts of accounts made in the office of the Accountant-General) be counted and charged for after the rate of seventy-two words per folio ; and where such copies or any portion thereof shall comprise columns containing figures, each figure shall be counted and charged for as one word (21st June, 1854 ; Ord. 1).

THE FIRST SCHEDULE.

SPECIAL EXAMINERS' FEES AND CHARGES. 8th May, 1845.

SPECIAL EXAMINERS' FEES.

For every day in which he is necessarily, and without any default of his own, detained in the performance of his duty as special examiner, for his expenses, the sum of (*h*)	2	2	0

(*h*) The fees of a Special Examiner for attending under Ord. 5th Feb. 1861, r. 12, to examine old or infirm witness *in England or Wales* are 1*l.* 1*s.* per day. See schedule to that order, *ante*.

For every day in which he is *bonâ fide* employed in the examination of witnesses, the further sum of . . .	3	3	0
For every mile he travels from his place of residence to the place of examination, and from place to place where the examination is adjourned, and from the place where he last acts in the examination of witnesses, to his place of residence, the sum of	0	1	6

THE SECOND SCHEDULE.

SOLICITORS' FEES.

Regulations as to Fees, 1860.

Solicitors' Fees.

FEES AND CHARGES TO BE ALLOWED TO SOLICITORS. 30th Jan. 1857. *Instructions.*

	Lower Scale.			Higher Scale.		
For original summons in chambers, special cases, answers, examinations, demurrers, pleas, and exceptions . . .	0	13	4	0	13	4
For bills	0	13	4	2	2	0
For amended or supplemental bill . .	0	6	8	0	13	4
For brief on moving for injunction .	0	13	4	1	1	0
For interrogatories for examination of parties or witnesses	0	6	8	0	13	4
For special petitions	0	6	8	0	13	4
For special affidavits	0	6	8	0	6	8
For brief in a suit by bill, on cause coming on for hearing, to be charged on service of notice of motion for a decree or on service of subpœna to hear judgment (*i*)	1	1	0	1	1	0
To defend proceedings commenced by bill, claim, special case, petition, or original summons	0	6	8	0	13	4
For instructions for order to revive or add parties	0	6	8	0	13	4

(*i*) See *Re Catlin*, 18 Beav. 517.

As to bills and answers, examinations, affidavits, and petitions, when the larger scale is applicable in lieu of the fixed fees for instructions for and for drawing, the Taxing Master is to be at liberty to take into his consideration the special circumstances of each case, and at his discretion to make such allowances for work, labour and expenses properly performed and incurred in or about the preparation of the bill or answer, examination, affidavit, or petition, as shall appear to him to be just, having regard to the length of the document, the nature of the suit, the interests of the parties, and the fund or person from which or by whom the costs are to be paid.

(The Chancery folio to be 72 words, and the sheet 10 folios.)

The Preparation of pleadings and other documents.

	Lower Scale.			Higher Scale.		
For drawing bills, special cases, answers, pleas, demurrers, exceptions, interrogatories, petitions, and affidavits, per folio	0	1	0	0	1	0
For ingrossing on parchment, per folio .	0	0	6	0	0	6
For ditto on paper (*k*)	0	0	4	0	0	4

(*k*) Answers are now to be printed, Ord. 6th March, 1860, and see rr. 6—15 of that order for the costs of printed answers, *ante*.

Affidavits are also to be printed: Ord. 16th May, 1862; and see rr. 6—8 of that order for the costs of printed affidavits, *ante*.

Regulations as to Fees, 1860.

Solicitors' Fees. In Chambers.

	Lower Scale.			Higher Scale.		
For drawing statements and other documents for the Judge's or Master's chambers, when required, including the fair copy thereof to leave in chambers (*l*)	0	0	8			

(*l*) See Ord. XXXV. 26, and note, *ante*.

For the like drawing when the larger scale is applicable				0	1	0
For fair copy thereof to be left in chambers				0	0	4
For drawing all advertisements to be signed by the Master or Judge's clerk, including the attendance thereon . .	0	6	8	0	13	4
For drawing request to the Accountant-General to lay out cash . . .	0	2	6	0	2	6
For ditto for every carrying over of cash or stock	0	2	6	0	2	6
For drawing caveat against signing or enrolling any decree or order . .	0	2	6	0	2	6
For drawing special notice of motion .	0	2	0	0	5	0
Or per folio	0	1	0	0	1	0
Drawing observations. For drawing such observations for counsel to accompany brief as may be necessary and proper, per sheet (*m*) . .				0	6	8

(*m*) See as to costs of observations, note to Ord. XL. 32, *ante*.

For drawing the brief on further consideration, per sheet	0	6	8	0	6	8
For preparing and filing replication .	0	6	8	0	10	0
For drawing statement on which counsel to move for order to revive or add parties, and copy	0	6	8	0	10	0
Or, according to circumstances, at per sheet				0	6	8
For drawing petition to revive, at per folio	0	1	0	0	1	0
For drawing and copying certificate to appoint guardians ad litem . .	0	6	8	0	6	8
For amending each copy of a bill to serve, where no reprint	0	6	8	0	13	4
Drawing amendments. For amending each brief bill, where no reprint	0	6	8	0	13	4
For preparing an original summons for the purpose of proceedings originating in chambers	0	13	4	1	1	0
For indorsing an original summons and						

	Lower Scale.	Higher Scale.	Regulations as to Fees, 1860.
			Solicitors' Fees.
the copies under the 8th Rule of the 35th of the Consolidated General Orders, and attending to get same sealed	0 6 8	0 6 8	
For preparing every other summons, and attending to get same filled up and sealed at chambers	0 6 8	0 6 8	
If special, not to exceed . . .		1 1 0	
For drawing bills of costs, including the copy for the Master's office, per folio (*n*)	0 0 8	0 0 8	Drawing bills of costs.

(*n*) See forms of bills of costs, Morgan and Davey, 429.

For certifying proceeding under lower scale of Court fees	0 5 0		

The fee for drawing a document in all cases includes a copy, if required, for the use of the solicitor or client, or for the settlement of counsel.

	Lower Scale.	Higher Scale.	
For perusing the print of a bill by the defendant's solicitor (*o*) . . .	1 1 0	1 1 0	*Perusals.*

(*o*) As to perusal of a written bill, see note (*m*), p. 164, *ante*.

	Lower Scale.	Higher Scale.
If exceeding 60 folios, at per folio . .		0 0 4
For perusing the print of an amended bill	0 13 4	0 13 4
If amendments exceeding 40 folios, at per folio		0 0 4
For perusing an amended bill, when amended in writing	0 6 8	0 6 8
If amendments exceeding 20 folios, at per folio		0 0 4
For perusing an answer	0 6 8	0 13 4
If exceeding 40 folios, at per folio .		0 0 4
For perusing an examination, at per folio	0 0 4	0 0 4
For perusing all special affidavits filed by an opposing party, at per folio . .	0 0 4	0 0 4
For perusing copy supplemental statement, under 15 & 16 Vict. c. 86, s. 53	0 6 8	0 13 4
For perusing copy order to revive . .	0 6 8	0 13 4

The fees for perusal are not to apply where the same solicitor is for both parties.

		Lower Scale.			Higher Scale.		
Regulations as to Fees, 1860.	Subject to the foregoing regulations as to charges for copies (*p*), copies of all documents are to be at the rate of per folio	0	0	4	0	0	4
Solicitors' Fees. Copies.	Or per sheet of 10 folios, at . . .	0	3	4	0	3	4
	Having regard to the preceding fees for perusal, the fee for "abbreviating" is to cease, and no close copies are now to be allowed as of course, but the allowance is to depend on the propriety of making the copy, which in each case is to be shown and considered (*p*).						
	(*p*) See p. xxxv., *ante*, and note (*g*).						
	For examining and correcting a proof, at per folio	0	0	2	0	0	2
	For each copy of a Judge's summons, to leave in chambers or to serve . .	0	2	0	0	2	0
	For each copy of a notice of motion, order, or certificate to serve . . .	0	1	0	0	1	0
	Or at per folio				0	0	4
Attendances.	For attending on a Master's warrant .	0	6	8	0	6	8
	Or, according to circumstances, not to exceed per diem	2	2	0	2	2	0
	For attending each counsel with his brief, case, or abstract, in a suit or other proceeding in this court	0	6	8	0	6	8
	For the like where the fee amounts to 5 guineas				0	13	4
	Where it amounts to 20 guineas . .				1	1	0
	Where it amounts to 40 guineas or upwards				2	2	0
	For attending to present special petition and for same answered	0	6	8	0	6	8
	For attending to present petition for order of course, and for order . . .	0	6	8	0	13	4
	For attendance on counsel and court on motion of course, and for order . .	0	6	8	0	13	4
In Court.	For attending on the day in which a cause or petition stands on the paper for hearing	0	6	8	0	10	0
	For attending when heard	0	13	4	1	1	0
	Or, according to circumstances, not to exceed per diem				2	2	0
	For attending the court on every special motion, each day	0	6	8	0	13	4
	The like, when heard	0	13	4	0	13	4

	Lower Scale.			Higher Scale.			Regulations as to Fees, 1860.
Or, according to circumstances, not to exceed				1	1	0	Solicitors' Fees.
For attending on motion for or to discharge order for injunction, or ne exeat, when heard, per diem	0	13	4	1	1	0	
Or, according to circumstances, not to exceed				2	2	0	
For attending to get answer or special affidavit sworn	0	6	8	0	6	8	
For attendance on the Registrar for directions to the Accountant-General to sell or transfer stock	0	6	8	0	6	8	
For attendance on the Accountant-General thereon	0	6	8	0	6	8	Attending Accountant-General.
For attending the Accountant-General with request to lay out cash . .	0	6	8	0	6	8	
The like to carry over cash or stock to another account in his books . .	0	6	8	0	6	8	
For attending Accountant-General to identify a person receiving a check .	0	6	8	0	6	8	
For attending the Accountant-General with order to bespeak, and afterwards to procure his directions for payment of money into Court, attending at the Bank of England to pay the money, and for attending on the Accountant-General with the receipt, and at the Report Office to bespeak and to procure the office copy	0	13	4	0	13	4	
Where the sum paid in shall amount to 100*l.*	1	1	0	1	1	0	
And where the same shall amount to 1000*l.*				2	2	0	
And where the same shall amount to 5000*l.*				3	3	0	
For attending the Master on signing report	0	6	8	0	6	8	
For attending to file report and certificates at the Report Office, and for office copy	0	6	8	0	6	8	
For attending Examiner to procure appointment to examine witnesses .	0	6	8	0	6	8	Attending examiner.
For attending the examination of witnesses before Examiner . . .	0	6	8	0	13	4	
Or, according to circumstances, not to exceed per diem	1	1	0	2	2	0	
But if without counsel, the fee may, at the Master's discretion, be increased to	2	2	0	3	3	0	
For attending to settle, and afterwards to							

Regulations as to Fees, 1860.

Solicitors' Fees for attendance.

	Lower Scale.			Higher Scale.		
read over the ingrossment of an answer or examination	0	6	8	0	13	4
If the same exceed 20 folios and under 50 folios	0	13	4	1	1	0
And for each additional 30 folios . .	0	6	8	0	6	8
For attending to insert an advertisement in Gazette	0	6	8	0	6	8
For entering caveat with the Clerks of Records and Writs	0	6	8	0	6	8
For attending to procure certificate of a caveat	0	6	8	0	6	8
For attending Registrar to certify abatement or settlement of suit, and to have same so marked in the Cause-book	0	6	8	0	6	8
For attending the printer with a bill or claim to be printed	0	6	8	0	6	8
For attending to get copies of bill, claim or interrogatories, marked for service	0	6	8	0	6	8
For attending to take instructions to appear and to enter the appearance of one or more defendants not exceeding three	0	6	8	0	6	8
If exceeding three, for every additional number not exceeding three . .	0	6	8	0	6	8
For attending at chambers to get original summons and duplicate examined and sealed	0	6	8	0	6	8
For attending at the Record and Writ Office to file duplicate and examine copies, and get same stamped . .	0	6	8	0	6	8
For attending on a summons or other appointment, each day, a fee of 6*s.* 8*d.*, 13*s.* 4*d.*, or 1*l.* 1*s.*, according to circumstances; each attendance to be allowed by the Judge or his chief clerk.	0	6 to 1	8 0	0	6 to 2	8 0

In difficult cases, Judge may allow solicitor a further fee of 1*l.* 1*s.*, or 2*l.* 2*s.*

Where from the length of the attendance, or from the difficulty of the case, the Judge shall think the highest of the above fees an insufficient remuneration for the services performed, or where the preparation of the case or matter, to lay it before the Judge in chambers or on a summons, shall have required skill and labour for which no fee has been allowed, the Judge may allow such further fee, not exceeding one guinea, or where the higher scale is applicable, two guineas, as in his discretion he may think fit. And where the preparation of the case or matter, to lay it before the Judge in chambers on a summons, shall have required and received from the solicitor such extraordinary skill and labour as

materially to conduce to the satisfactory and speedy disposal of the business, and therefore shall appear to the Judge to deserve higher remuneration than the ordinary fees, the Judge may allow to the solicitor, by a memorandum in writing expressly made for that purpose, and signed by the Judge, specifying distinctly the ground of such allowance, such further fee, not exceeding ten guineas, as in his discretion he may think fit, instead of the above further fee of one guinea or two guineas (2 Feb. 1855).

Regulations as to Fees, 1860.

Solicitors' Fees.

Or on special grounds a further fee not exceeding 10*l.* 10*s.*

	Lower Scale.			Higher Scale.		
For perusing the affidavits of claimants coming in under the 38th Rule of the 35th of the Consolidated General Orders, and attending in chambers at the time appointed by the advertisement, where the number of claims do not exceed five	0	10	6	1	1	0
Where the number exceeds five, for every additional number, not exceeding five, an additional sum of	0	10	6	1	1	0
For attending for every order drawn up by the Chief Clerk, and at the Registrar's Office to get same entered . .	0	6	8	0	6	8
For attending to enter claim under the 38th Rule of the 35th of the Consolidated General Orders, and to file affidavit	0	6	8	0	6	8
For the plaintiff or party having the conduct of the order, attending the Registrar with brief and papers to bespeak minutes or order, not being an order of course	0	6	8	0	6	8
For ditto, for preparing list of evidence read (but only when required by the Registrar, and certified by him) .	0	6	8	0	6	8
Or, according to length, at per folio . .				0	1	0
Attending to settle the draft, or minutes of any decree or order (*q*) . . .	0	6	8	0	13	4
Or, at the Taxing Masters' discretion, not to exceed (*q*)	1	1	0	3	3	0

Attending on claims in chambers.

(*q*) The solicitor is entitled to his costs of minutes where an order is pronounced, though no minutes are actually drawn, *Gould* v. *Drummett*, 2 L. R. Eq. 609.

	Lower Scale.			Higher Scale.		
Attending to pass any decree or order not being an order of course, including the entry thereof	0	6	8	0	13	4

N.B.—The Registrar will leave the order for entry.

In case the Registrar shall certify that a special allowance ought to be made in respect of any unusual difficulty in settling and

Regulations as to Fees, 1860.

passing an order, the Taxing Master is to consider the same, and make such allowance to all or any of the parties as to him shall seem just.

Solicitors' Fees.

	Lower Scale.			Higher Scale.		
For attending to procure certificate of pleadings	0	6	8	0	6	8
For attending to procure Accountant-General's certificate of fund in court	0	6	8	0	6	8
For attending to obtain consent of next friend to sue in his name	0	6	8	0	13	4
For attending to give consent to take answer without oath, to hear cause as short, and for other necessary or proper consents of a like nature	0	6	8	0	6	8
For attending to procure such consents	0	6	8	0	6	8
For procuring certificate of counsel to mark cause short, and attending Registrar thereon	0	6	8	0	6	8
For attendance to mark Master or conveyancing counsel	0	6	8	0	6	8
Attending in consultations. For attendances in consultation or in conference with counsel	0	13	4	0	13	4
For attending to set down cause or appeal for hearing	0	6	8	0	6	8
For attending to leave papers with Judge's secretary prior to hearing	0	6	8	0	6	8
For attending court on appointment of a guardian ad litem	0	13	4	0	13	4
For attending to procure transcripts of Accountant-General's books, when necessary	0	6	8	0	6	8

The fees for consent are not to apply where the same solicitor is for both parties.

	Lower Scale.			Higher Scale.		
Writs. For every writ of subpœna duces tecum	0	6	8	0	6	8
For a writ or writ of subpœna other than subpœna duces tecum, if the number of names therein shall not exceed three	0	6	8	0	6	8
If exceeding three names, for every additional number not exceeding three	0	6	8	0	6	8
For instructions for every writ of fieri facias de bonis ecclesiasticis, or writ of sequestrari facias (18th July, 1857, Order 5)	0	6	8	0	6	8
For preparing every writ of fieri facias de bonis ecclesiasticis, or writ of sequestrari facias (18th July, 1857, Order 5)	0	13	4	0	13	4

	Lower Scale.			Higher Scale.			Regulations as to Fees, 1860. Solicitors' Fees.
For attending to lodge any writ of fieri facias de bonis ecclesiasticis, or writ of sequestrari facias at the Bishop's registry, and for attending to instruct the officer charged with the execution of such writ (18th July, 1857, Order 5)	0	6	8	0	6	8	
For preparing every other writ without order	0	6	8	0	6	8	
For every writ under order, except special injunction	0	13	4	0	13	4	
For special injunction, including ingrossment and docket	0	10	0	1	0	0	
Or per folio	0	1	4	0	1	4	
For enrolling a decree or order	0	10	0	1	0	0	
Or per folio	0	1	4	0	1	4	
For service of a notice of motion, exclusive of copy	0	2	6	0	2	6	*Notices and Services.*
For notice to a solicitor of appearance, answer, demurrer, plea, amendment, and replication	0	2	6	0	2	6	
For notice of claim, under 36th Order of 16th October, 1852 (XXXV. 38) (*r*)	0	2	6	0	2	6	
For notice of evidence to be read in Judge's chambers	0	2	6	0	2	6	
For notice of filing affidavit or set of affidavits filed, or which ought properly to have been filed together, to be read in court	0	2	6	0	2	6	
For notice of appointment for settling and passing minutes, decree, or orders before the Registrar	0	2	6	0	2	6	
For copy and service of a warrant on a solicitor	0	2	6	0	2	6	
For service of a Judge's summons, exclusive of the copy	0	2	6	0	2	6	
For service of a petition	0	2	6	0	2	6	
For service of an order, exclusive of the copy	0	2	6	0	2	6	
For other necessary or proper notice	0	2	6	0	2	6	
For services on a party or witness such reasonable charges and expenses as may be properly incurred, according to distance or by the employment of an agent.							

(*r*) See also Ord. 27 May, 1865, *ante*.

Regulations as to Fees, 1860.

Solicitors' Fees.

The fees for notices and services are not to apply where the same solicitor is for both parties, unless it be necessary for the purpose of making affidavit of service.

There is to be one notice only of settling minutes, and one notice of passing decree or order, which if necessary are to be continued by adjournment, of which all parties are to take notice.

	Lower Scale.			Higher Scale.		
Oaths and Exhibits. To the Commissioner for oath in London, according to statute (*s*) . . .	0	1	6	0	1	6
In the country	0	2	6	0	2	6
To the solicitor for preparing each exhibit in town and country . . .	0	1	0	0	1	0
The Commissioner for marking each exhibit	0	1	0	0	1	0

(*s*) See page 231, *ante.*

Term fee. For a term fee in all causes, for every term in which a proceeding by the party shall take place	0	10	0	0	10	0
And for letters per term	0	5	0	0	5	0
In country agency causes the further fee for letters of				0	6	8

Agency Correspondence.

And if it be shown to the satisfaction of the Taxing Master that the agency correspondence has been special and extensive, he is to be at liberty to make a special allowance in respect thereof.

In addition to the term fee the necessary expense of the postage, carriage, and transmission of documents is to be allowed.

The like term fee and for letters in matters as in causes.

Where no proceeding is taken which carries a term fee, a charge for letters may be allowed, if the circumstances shall require it.

For any work or labour properly performed and not herein provided for, such allowances are to be made as heretofore.

Regulations as to Fees, 1860.

THE THIRD SCHEDULE.

Solicitors' Fees.

OTHER FEES TO BE ALLOWED TO SOLICITORS.

OTHER FEES TO BE ALLOWED TO SOLICITORS. 26th Feb. 1857—30th Jan. 1857.

	Lower Scale.	Higher Scale.
For perusing abstract, every three brief sheets	0 6 8	
For perusing the draft of every deed, for each skin	0 5 0	
For examining the engrossment with the draft, for every three skins	0 10 0	
For making all attested copies, examining and attesting same, per folio	0 0 6	

Perusing abstracts and deeds.

Making and examining copies.

THE FOURTH SCHEDULE.

FEES TO BE COLLECTED BY MEANS OF STAMPS.

FEES TO BE COLLECTED BY MEANS OF STAMPS (*t*) 30 Jan. 1857.

	Lower Scale.	Higher Scale.
For every original summons for the purpose of proceedings originating in chambers	0 5 0	0 5 0

In the Judges' Chambers.

(*t*) As to collecting fees by means of stamps, see sect. 6 of the Suitors' Relief Act, p. 227, *ante*, and Ord. XXXIX. 3.

	Lower Scale.	Higher Scale.
For every duplicate thereof	0 1 0	0 5 0
For every other summons	0 1 0	0 3 0
For every order drawn up by the Chief Clerk, made upon applications for time to plead, answer, or demur, for leave to amend bills, or for enlarging the period for closing evidence	0 1 0	0 5 0
For every other order drawn up by the Chief Clerk	0 10 0	1 0 0
For every advertisement		1 0 0
For every certificate or report	1 0 0	1 0 0
*For every certificate upon the passing of a receiver's or consignee's account, a further fee in respect of each 100*l.* of the *net balance* received by such receiver or consignee, *after deducting all necessary outgoings* (*u*) for rents, taxes, rates, repairs, and management of the property	0 10 0	0 10 0

Regulations as to Fees, 1860.

Fees to be collected by stamps.

(*u*) The latter words are new. The fee was formerly (except where provided for by a special order) calculated on the gross instead of the net profits. See *Wastell* v. *Leslie*, 4 D. M. G. 818 (note); *Buckmaster* v. *Buckmaster*, 7 W. R. 678.

In *Wells* v. *Wells*, 4 D. M. G. 816, and *Neave* v. *Douglas*, 26 L. J. Ch. 756, special orders were made to pay such fee as the judge should think reasonable.

	Lower Scale.			Higher Scale.		
For every oath, affirmation, declaration, or attestation upon honour . . .	0	1	6	0	1	6
In the Masters' Office. For every warrant or summons . .	0	3	0	0	3	0
For every certificate or report . . .	1	0	0	1	0	0
For taking the acknowledgment of every married woman	1	6	8	1	6	8
For attending any court per day by the clerk	0	14	0	0	14	0
*For every certificate upon the passing of a receiver or consignee's account (*b*), a further fee in respect of each 100*l.* of the *net balance* received by such receiver or consignee, after deducting *all necessary outgoings* (*u*) for rents, taxes, rates, repairs, and management of the property	0	10	0	0	10	0

(*v*) See note (*u*), *supra*.

In the Registrar's Office. For every decree or decretal order made by the Court on a special case, or on the original hearing of a cause or claim, or on motion for a decree, and on further directions, or further consideration not made on summons adjourned from chambers	1	0	0	3	0	0
For every order on petition or motion of course	0	1	0	0	5	0
For every other order	0	10	0	1	0	0
For every office copy of a decree or order, and for every office copy of a petition of appeal or rehearing made under the 12th Rule of the 36th of the Consolidated General Orders . . .	0	10	0	1	0	0

Note.—The above fees are to include the charge for entry.

	Lower Scale.			Higher Scale.		
In the Examiner's Office. For every witness sworn and examined, including oath, for each hour . .	0	5	0	0	5	0

	Lower Scale.			Higher Scale.			Regulations as to fees, 1860.
For every witness sworn and examined away from the office (*w*) (besides coach hire and reasonable expenses) . .	1	7	0	1	7	0	Fees to be collected by stamps.
If more than five miles from the Examiner's Office, for the first day . .	2	15	0	2	15	0	
For every other day	2	2	0	2	2	0	
Upon every application to inspect depositions, including the inspection . .	0	3	0	0	3	0	
Upon every application to search book for causes, including search . . .	0	1	0	0	1	0	
Upon every application to search book for depositions, including search . .	0	1	0	0	1	0	
For making all office and other copies, per folio	0	0	4	0	0	4	*In the Record and Writ Clerk's Office, and Report Office.*
For filing every bill or information .	0	10	0	1	0	0	
For filing every claim	0	5	0	0	5	0	
For filing every special case . . .	1	0	0	1	0	0	
Upon entering every appearance, if not more than three defendants . . .	0	7	0	0	7	0	
If more than three and not exceeding six defendants	0	14	0	0	14	0	
And the same proportion for every like number of defendants.							
For every certificate	0	4	0	0	4	0	
For marking every copy of a bill, claim, or summons to be served . . .	0	1	0	0	5	0	
For every writ of summons, distringas, subpœna, or attachment . . .	0	5	0	0	5	0	
For every writ of fieri facias de bonis ecclesiasticis or sequestrari facias (18th July, 1857, Order 5) . . .	1	0	0	1	0	0	
For sealing every other writ . . .	1	0	0	1	0	0	
For every oath, affirmation, declaration, or attestation upon honour, except for the purpose of receipt of dividends from the Accountant General . .	0	1	6	0	1	6	
For examining every copy or part of a copy of a set of interrogatories, and marking same as an office copy . .	0	1	0	0	5	0	
Upon every application for a search for a record, and for searching . . .	0	2	0	0	2	0	
Upon every application for a search in the Report Office (25th Oct. 1852, Sched. 1, Pt. 2)	0	0	6	0	0	6	
Upon every application to inspect a record, and for inspecting the same .	0	5	0	0	5	0	

(*w*) See page 185, *ante*.

Regulations as to Fees, 1860.

Fees to be collected by stamps.

	Lower Scale.	Higher Scale.
Upon every application to inspect exhibits, if occupied not more than one hour .	0 5 0	0 5 0
If more than one hour, per diem . . .	0 10 0	0 10 0
Upon every application for the officer's attendance in courts of law, per diem, and for his attendance, besides reasonable expenses of the officer . . .	1 0 0	1 0 0
Upon every application for the officer's attendance in a court of equity, and for his attendance, per diem . .	0 10 0	0 10 0
Upon every application to swear an invalid, including the attendance, besides necessary expenses	0 10 0	0 10 0
For examining and signing enrolments of decrees and orders	3 0 0	3 0 0
For filing caveat against claim to revive, or against decree or order or enrolment .	0 5 0	0 5 0
For filing supplemental statement or statement for revivor . . .	0 5 0	0 10 0
For filing every affidavit, including schedules and exhibits	0 2 6	0 2 6
For every application to inspect an affidavit	0 0 6	0 0 6
For amending every record of a bill, claim, or special case	0 10 0	0 10 0

In the Taxing Master's Office.

For every warrant or summons, (but not more than one warrant or summons is to be issued on one bill, or set of bills unless the Taxing Master shall think it necessary to issue a new warrant or summons)	0 1 0	0 3 0
On signing every report and certificate .	0 10 0	1 0 0
Upon the taxation of every bill of costs, as taxed, where the amount shall not exceed 20*l.*	0 10 0	0 10 0
Upon every additional 20*l.*, or fractional part thereof, a further fee of . .	0 10 0	0 10 0
For every oath, affirmation, or attestation upon honour	0 1 6	0 1 6

Where no certificate of the taxation of a bill of costs is required, the ad valorem duty hereby directed to be levied in respect of the taxation of costs shall nevertheless be due, and shall be payable on the amount of the bill as taxed, or on the amount of such part thereof as may have been taxed ; and the solicitor shall in such case cause the proper stamp (the amount thereof to be fixed by the Taxing Master) to be impressed on or annexed to the bill of costs (4th Dec., 1852 ; Ord. 1).

But where the Taxing Master sends a bill or part of a bill to the officer of any other court (*x*), with a request to such officer to assist him in the taxation thereof, and the officer of such other court takes his fee thereon, the ad valorem duty hereby directed to be levied in respect of the taxation of costs shall not be paid on that part of the bill so taxed and charged for by the officer of such other court (29th Nov. 1853). Regulations as to Fees, 1860. Fees to be collected by stamps.

(*x*) See notes to Ord. XL. 1—3, *ante*.

In the Lord Chancellor's Principal Secretary's Office.

	Lower Scale.			Higher Scale.		
On all attendable petitions, appeals, rehearings, and letters missive . .	0	5	0	1	0	0
On all non-attendable petitions (*y*) . .	0	5	0	0	10	0

(*y*) Petitions not of course are answered by a memorandum directing *attendance*. See notes to Ord. XXXIV. *ante*.

As to what petitions for orders of course in causes attached to the Vice-Chancellors are addressed to the Lord Chancellor, see same notes and Regist. Regul. 2, 3, p. lxxx. *post*.

	Lower Scale.			Higher Scale.		
On a matter of course order, on a petition of right	0	10	0	0	10	0
On an order for a commission on a petition of right	1	0	0	1	0	0

In the Office of the Secretary at the Rolls.

On every petition set down for hearing, to include the fee on hearing . .	0	5	0	1	0	0
On the petition for every order of course	0	1	0	0	5	0
On the admission of every solicitor . .				1	17	0

For preparing power of attorney with affidavit, exclusive of stamp duty . .	0	3	0	0	3	0
Upon every application for a search .	0	5	0	0	5	0
For transcript of accounts, each opening consisting of debtor and creditor sides of the account (30th Jan. 1857, and 21st June, 1854, Ord. 2). . .	0	2	0	0	2	0

THE FIFTH SCHEDULE.

AMOUNTS OF STAMPS.

AMOUNTS OF STAMPS FOR COLLECTING FEES. 7th Sept. 1852. 3rd Dec. 1852. 26th July, 1855

One penny, threepence, fourpence, sixpence, eightpence, one shilling, one shilling and fourpence, one shilling and sixpence, one shilling and eightpence, two shillings, two shillings and sixpence, two shillings and eightpence, three shillings, three shillings and

Regulations as to Fees, 1860.

sixpence, four shillings, five shillings, seven shillings, eight shillings, ten shillings, fourteen shillings, one pound, two pounds, three pounds, four pounds, five pounds, ten pounds.

Fees to be collected by stamps.

CAMPBELL, C.
JOHN ROMILLY, M. R.
J. L. KNIGHT BRUCE, L. J.
G. J. TURNER, L. J.
RICHD. T. KINDERSLEY, V.-C.
JOHN STUART, V.-C.
W. P. WOOD, V.-C.

Hilary Term, 1860.

REGULATIONS AS TO BUSINESS

(*Not having the force of General Orders*).

Regulations (*a*) *to be observed in the conduct of business at the chambers of the Master of the Rolls and the Vice-Chancellors, by order of the Right Honourable Sir John Romilly, Master of the Rolls; the Honourable the Vice-Chancellor Sir Richard Torin Kindersley; the Honourable the Vice-Chancellor Sir John Stuart; and the Honourable the Vice-Chancellor Sir William Page Wood; this 8th day of August*, 1857. Regulations as to business, August 8, 1857.

I. SUMMONSES are not to be altered after they are sealed, except upon application at chambers, and any alterations then made will be marked with the seal of such chambers. 1. Alteration of summons.

(*a*) These regulations merely point out the way in which proceedings may be taken for the sake of convenience; but they are not absolutely obligatory in every case (per V.-C. Stuart, 7 W. R. 157; and see *Re Longstaffe's Estates*, 1 Drew. & Sm. 142).

II. Upon application for time to answer, a printed copy of the bill and the interrogatories to be answered, are to be produced. 2. Production of bill, &c., on applications for time to answer.

III. Whenever any matter is adjourned from the Court to chambers, or any directions are given in Court to be acted upon at chambers, whether upon a matter adjourned into Court from chambers or upon any other occasion, without an order being drawn up, a note signed by the registrar, stating for what purpose such matter is adjourned to chambers, or the directions given, is to be procured from the registrar, and left at chambers (*b*). 3. Registrar's note on adjournment to chambers.

(*b*) See notes to 15 & 16 Vict. c. 80, s. 27, p. 148, *ante*.

IV. In drawing up decrees and orders to be left at chambers, the solicitors are to take care that every account, inquiry, sale, direction to appoint receiver, and other direction to be answered at chambers, is numbered consecutively according to the form set forth in the Schedule (D) referred to in the General Consolidated Order XXIII. 15 (*c*), and that the other directions are not numbered. 4. Numbering of accounts.

(*c*) See p. v. *ante*.

V. At the same time that any decree or order made in a suit instituted by bill is left at chambers, a print of the bill is to be left. 5. Leaving of print of bill at chambers.

VI. A note stating the names of the solicitors for all the parties, and showing for which of the parties such solicitors are concerned, is to be left at chambers with every decree or order. 6. Note of names of solicitors and parties.

VII. For the purpose of procuring the direction of the judge as 7. Service of

Regulations as to business, August 8, 1857.

to the manner of serving notice of a decree or order, pursuant to the General Consolidated Order VII. 5 (*d*).

The plaintiff is to make an *ex parte* application by summons, and thereupon to show by affidavit as far as he is able :—

notice under Ord. VII. 5.

1. *With respect to Infants :—*

The ages of the infants.

Whether they have any parents or testamentary guardians, or guardians appointed by the Court of Chancery.

Where and under whose care the infants are residing, at whose expense they are maintained, and in case they have no father or guardian, who are their nearest relations.

And that the parents, guardians, relations, or persons on whom it is proposed to serve the notice, have no interest in the matters in question, or if they have, the nature of such interest, and that it is not adverse to the interests of the infants.

2. *With respect to persons of Unsound Mind not found so by Inquisition :—*

Where and under whose care such persons are residing, and at whose expense they are maintained.

Who are their nearest relations, and that such relations, or persons upon whom it is proposed to serve the notice, have no interest in the matters in question, or if they have, the nature of such interest, and that it is not adverse to the interest of the persons of unsound mind.

(*d*) See note (*b*), p. 197, *ante.*

8. Copy of certificate of entry, &c., to be left at chambers.

VIII. A copy of every certificate by a record and writ clerk of his entry of a memorandum of service of notice of a decree or order, and of every order giving liberty to a person served with such notice to attend the proceedings, certified by the solicitor, is to be left at chambers (*e*).

(*e*) See Ord. XXIII. 19, *ante*, as to this memorandum of service.

9. Number of entry of claim to be stated in notice.

IX. Upon the notice of a claim having been entered at chambers by a creditor or other claimant served upon the solicitors in the cause the number of the entry of the claim is to be stated (*f*).

(*f*) See Ord. XXXV. 38, *et seqq.*, and Ord. 37 May, 1865, *ante.*

10. Alterations in accounts verified by affidavit.

X. Every alteration in an account verified by affidavit to be left at chambers is to be marked with the initials of the commissioner or officer before whom the affidavit is sworn, and such alterations are not to be made by erasures with the knife or other instrument.

11. Accounts, &c., to be referred to as exhibits.

XI. Accounts, extracts from parish registers, particulars of creditors' debts, and other documents referred to by affidavit, are not to be annexed to the affidavit, or referred to in the affidavit as annexed, but are to be referred to as exhibits (*g*).

(*g*) See as to form of affidavits generally, notes to Ord. XVIII. 1, *ante.*

XII. Every certificate on an exhibit referred to in an affidavit signed by the commissioner or officer before whom the affidavit is sworn, must have the short title of the cause or matter. Regulations as to business, August 8, 1857.

XIII. Affidavits for the purpose of enabling the judge to fix reserved bids are to state the value of the property, by reference to an exhibit containing such value, so that the value may not be disclosed by the affidavit when filed (*h*). 12. Certificates on exhibit. 13. Affidavits as to the fixing of reserved biddings.

XIV. As soon as particulars and conditions of sale settled at chambers have been printed, two prints thereof, certified by the solicitor to be correct prints of the particulars and conditions settled at the judge's chambers, are to be left at chambers (*h*). 14. Prints of particulars and conditions of sale to be left in chambers.

XV. An office copy of the affidavit of the person appointed to sell, of the result of the sale, with the bidding paper and particulars therein referred to, are to be left at chambers at least one clear day before the day appointed for settling the certificate of the result of the sale (*h*). 15. Office copy of affidavit of persons appointed to sell.

(*h*) See notes to Ord. XXXV. 13, *ante*.

XVI. Receivers' accounts are to be delivered at chambers on or before the day appointed for that purpose, and in default the receiver will be liable to the consequences imposed by the General Consolidated Order XXIV. 2 (*i*). 16. Time for receivers to deliver their accounts.

(*i*) See notes to Ord. XXIV. *ante*.

XVII. All accounts, copies and papers, left at chambers, are to be written upon foolscap paper bookwise, unless the nature of the document renders it impracticable to do so. 17. Accounts &c., to be written on foolscap paper bookwise.

XVIII. Where any cause originating in chambers shall, at the original or any subsequent hearing thereof, have been adjourned for further consideration, such cause may, after the expiration of eight days, and within fourteen days from the filing of the certificate of the chief clerk of the judge to whose court the cause is attached, be brought on for further consideration (*k*) by a summons to be taken out by the plaintiff or party having the conduct of the cause, and after the expiration of such fourteen days, by a summons to be taken out by any other party. And such summons is to be in the form prescribed by the Consolidated Order XXXV. 2, and set forth in the Schedule (K) thereto; and the object of the application may be stated as follows:—"That this cause, the further consideration whereof was adjourned by the order of the day of , 18 , may be further considered." 18. Adjournment of cause in chambers.

This summons is to be served six clear days before the return.

(*k*) See note (*k*), p. 149, *ante*.

XIX. Upon application for the appointment of guardians of infants and allowance for maintenance (*l*), the evidence is to show:— 19. Evidence on application for appointment of guardians and allowance of maintenance.

1. The ages of the infants.
2. The nature and amount of the infants' fortunes and incomes.
3. What relations the infants have.

(*l*) See note (*e*), p. 146, *ante*, head 3.

XX. Upon applications to obtain the sanction of the Court to 20. Evidence

Regulations as to business, August 8, 1857.

on applications under 18 & 19 Vict. c. 43.

infants making settlements on marriage, under the Act of 18 & 19 Vict. cap. 43 (*m*), evidence is to be produced to show—

1. The age of the infant.
2. Whether the infant has any parents or guardians.
3. With whom or under whose care the infant is living, and if the infant has no parents or guardians, what near relations the infant has.
4. The rank and position in life of the infant and parents.
5. What the infant's property and fortune consist of.
6. The age, rank, and position in life of the person to whom the infant is about to be married.
7. What property, fortune, and income such person has.
8. The fitness of the proposed trustees and their consent to act.

The proposals for the settlement of the property of the infant, and of the person to whom such infant is proposed to be married, are to be submitted to the judge.

(*m*) See p. 234, *ante*.

21. Appointment of guardians under 19 & 20 Vict. c. 120, and Ord. XLI. 23.

XXI. For the purpose of procuring the appointment of a guardian to infants under the Act of Parliament of 19 & 20 Vict. c. 120, and the Consolidated General Order XLI. 23 (*n*).

A summons should be taken out in the names of the infants by a next friend, in the form used for originating proceedings in chambers, intituled in the same manner as the petition or intended petition,—that , or some other proper person or persons, may be appointed guardian or guardians of the said infants, for the purpose of making an application on behalf of the said infants [*or*, consenting on behalf of the said infants to an application] to the Court under the provisions of the above Act. In case the application to the Court is to be made on behalf of the infants, the guardian must be appointed before the petition is presented (*n*). If the guardian is to consent to an application, the guardian may be appointed either before or after the petition is presented.

Evidence.

Upon the application to appoint such guardian, the following evidence is to be adduced :—

1. The age of the infant.
2. Whether he has any parent, testamentary guardian, or guardian appointed by the Court of Chancery.
3. Where and under whose care the infant is residing, and at whose expense he is maintained.
4. In what way the proposed guardian is connected with the infant, and why proposed, and how qualified to be appointed.
5. That the proposed guardian has no interest in the intended application, or if he has, the nature of his interest, and that it is not adverse to the interest of the infant.
6. The consent of the guardian to act.
7. The nature of the intended application to the Court.

(*n*) See note (*u*), p. 251, *ante*.

22. Leave to make or con-

XXII. For the purpose of procuring the direction of the judge

for leave to make or consent to an application on behalf of infants or lunatics under the said Act of 19 & 20 Vict. c. 120, and the Consolidated General Order XLI. 23, a summons is to be taken out after the petition is presented in the ordinary form, intituled in the same manner as the petition, by the guardian of the infant or committee of the lunatic, that he may be at liberty on behalf of the infant or lunatic to make the application [*or*, consent to the application] to the Court proposed to be made by the petition presented to the Lord Chancellor [*or* Master of the Rolls] on the day of

Regulations as to business, August 8, 1857.

Upon this application the guardian or committee should make an affidavit that he believes it to be proper and for the benefit of the infant or lunatic that the application proposed to be made should be made [or consented to] on behalf of the said infant or lunatic, and such other evidence, if any, should be adduced, as the circumstances of the case may require, to show the propriety of the application so far as the infant or lunatic is concerned, and the petition should be produced.

sent to application on behalf of infants, &c., under 19 & 20 Vict. c. 120, and Ord. XLI. 23.

XXIII. For the purpose of procuring the directions of the judge pursuant to the General Order XLI. 16 (*o*).

23. Procuring directions of judge under Ord. XLI. 16.

A summons is to be taken out after the petition has been answered, intituled in the same manner as the petition, that directions may be given in what newspapers the notices required by the Act are to be inserted.

The petition is to be produced on the return of the summons, and the judge's direction will be written on the petition and signed by his chief clerk.

(*o*) See note (*e*), p. 245, *ante*.

XXIV. The forms set forth in the schedule hereto are to be adhered to, and only to be varied in so far as may be necessary to meet the circumstances of the case.

24. Variation of forms.

JOHN ROMILLY, M. R.
RICHARD T. KINDERSLEY, V.-C.
JOHN STUART, V.-C.
W. P. WOOD, V.-C.

THE SCHEDULE

ABOVE REFERRED TO.

No. 1.—*Affidavit of Service of Summons originating Proceedings in Chambers.*

In Chancery.

[Title.]

I of make oath and say as follows:

1.—I say that I did on the day of serve the above named defendant [*or*, of, &c.] with

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a summons in this cause and matter [*or*, matter], bearing date the day of , issued from and under the seal of the chambers of the Master of the Rolls [*or*, the Vice-Chancellor] [*and addressed to the said and others] by delivering to and leaving with the said at [*or*, with (*state what member of his family*) of the said at his dwelling house, situate] a true copy of the said summons, duly stamped with a stamp of the Record and Writ Clerks' office, indicating the filing of a duplicate of the said summons at the said office, and at the same time showing the said the said summons, by which summons the said was required to attend at the chambers aforesaid, at on the day of , at of the clock in the noon, and show cause if he could why an order for the administration of the estate of the above-named should not be granted [*or in cases other than administration summonses, instead of the words* and show cause, &c., *as follows ;* on the hearing of an application on the part of for the purposes therein specified].

* These words to be added in all cases except administration summonses.

2.—And I further say that there was at the foot of the copy of the said summons so served, and at the foot of the said summons when so produced as aforesaid, a memorandum or statement that such summons was taken out by of solicitor for , and a notice that if the said did not attend, either in person or by his solicitor, at the time and place mentioned in the said summons [*or*, at the place mentioned in the said summons at the time mentioned in the indorsement thereon] such order would be made and proceedings taken as the judge might think just and expedient.

This is to be added when the time has been extended.

3.—And I further say, that there was, upon the copy so served, an indorsement, dated the day of under the seal of the chambers of the said judge, whereby the day of , at of the clock in the noon, was appointed for the parties who had not been served with the said summons to attend at the said chambers.

No. 2.—*Affidavit of Service of Summons, not being a Summons originating Proceedings in Chambers.*

In Chancery.

[Title.]

I, of , make oath and say as follows :

1.—I say that I did on the day of serve Mr. , the solicitor for the above-named defendant [*or*, for of, &c.] with a summons in this cause [*or*, matter], bearing date the day of , issued from and under the seal of the chambers of the Master of the Rolls [*or*, the Vice-Chancellor], and addressed to the said , by delivering to and leaving with the said [*or*, with of the said at his office, situate], a true copy of the said summons, and at the same time showing the said

Regulations as to business, August 8, 1857.

the said summons, by which summons the said was required to attend at the chambers aforesaid, at on the day of , at of the clock in the noon, on the hearing of an application on the part of for [*state the object*].

2.—And I further say that there was at the foot of the copy of the said summons so served, and at the foot of the said summons when so produced as aforesaid, a memorandum or statement that such summons was taken out by of solicitor for .

No. 3.—*Affidavit as to Production of Documents pursuant to an Order* (*p*).

In Chancery.

[Title.]

I, of , make oath and say as follows:

1.—I say I have in my possession or power, the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto annexed.

The two parts of the schedule are only necessary when the deponent objects to the production of some of the documents.

2.—I further say, that I object to produce the said documents set forth in the second part of the said first schedule hereto.

3.—I further say,

[*state upon what grounds the objection is made, and verify the facts so far as may be*].

4.—I further say, that I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto annexed.

5.—I further say, that the last-mentioned documents were last in my possession or power on [*state when*].

6.—I further say,

[*state what has become of the last-mentioned documents, and in whose possession they now are*].

7.—I further say, according to the best of my knowledge, remembrance, information, and belief, that I have not now, and never have had, in my own possession, custody, or power, or in the possession, custody, or power, of my solicitors or agents, or solicitor or agent, or in the possession, custody, or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto.

NOTE.—*If the party denies having any, he is to make an Affidavit in form of the 7th paragraph, omitting the exception.*

(*p*) See note (*p*), p. 173, *ante*.

No. 4.—*Account of Personal Estate.*

IN CHANCERY. A.

[TITLE.]

This Account marked A. was produced and shown to A. B., C. D., and E. F., and is the Account referred to in their Affidavit sworn this day of

Before me [*to be signed here by Commissioner or Officer before whom the Affidavit is sworn.*]

RECEIPTS.

No. of Item.	Date when received.	Names of Persons from whom received.	On what Account received.	Amount received. £ s. d.
	1851.			
1		. . . . .	Found in house . .	
2		Evans & Co. . .	Balance at Bankers .	
3		. . . . .	Half-year's dividend on £2000 £3 per cent. annuities due .	
4		John James . .	Half-year's rent of freehold due . . .	
5		Samuel Jones . .	Bond debt of £300 and interest from to	
6		James Evans . .	Half-year's rent of leasehold house due	
7		William Williams .	Produce of sale of the above leasehold house	

DISBURSEMENTS.

No. of Item.	Date when paid or allowed.	Names of Persons to whom paid or allowed.	For what purpose paid or allowed.	Amount paid or allowed. £ s. d.
	1851.			
1		James Price . .	Undertaker's bill for funeral	
2		Messrs. A. & B. .	Proctor's bill for probate	
3		John George . .	A debt due to him for medical attendance .	
4		James Price . .	Bond debt of £1000 and £25 for interest thereon from to	

NOTE.—The items on both sides are to be stated chronologically.

No. 5.—*Account of Rents and Profits.*

IN CHANCERY. B.

[TITLE.]

This Account marked B. was produced and shown to A. B., C. D., and E. F., and is the Account referred to in their Affidavit sworn this day of

Before me [*to be signed here by Commissioner, or Officer before whom Affidavit sworn*].

RECEIPTS. DISBURSEMENTS.

No. of Item.	Date when received.	Names of Persons from whom received.	On what Account and in respect of what Part of the Estate received and when due.	Amount received.	No. of Item.	Date when paid or allowed.	Names of persons to whom paid or allowed.	For what purpose paid or allowed.	Amount paid or Allowed
	1851.			£ s. d.		1851.			£ s. d.
1		John James . . .	Half-year's rent for farm in parish of due		1		Sun Insurance Office . . .	One year's Insurance against fire due . .	
2		Thomas James . .	One quarter year's rent of house at . due		2		Thomas Carpenter	Repairs at John James's farm	
3		John James . . .	Same as No. 1, due .		3		James Francis .	Income Tax half-year due 10th October .	

NOTE.—The items on both sides are to be stated chronologically.

Regulations as to business, August 8, 1857.

Regulations as to business, August 8, 1857.

No. 6.—*Affidavit verifying Accounts, and answering usual inquiries as to Real and Personal Estate.*

In Chancery.

[Title.]

WE, A. B. of &c. C. D. of &c. and E. F. of &c. the above-named defendants severally make oath and say as follows :—

1.—We say that we have according to the best of our knowledge, remembrance, information, and belief, set forth in the first schedule hereunder written a full true and particular account and inventory of the personal estate of or to which G. H. the testator in the decree [*or*, order] dated made in this cause named or referred to and who died on the day of was possessed or entitled at the time of his death *and not by him specifically bequeathed.*

The words in italics to be inserted only when the direction is to take an account of personal estate not specifically bequeathed.

2.—And we further say that save what is set forth in the said first schedule *and what is by the said testator specifically bequeathed* the said testator was not to the best of our knowledge information or belief at the time of his death possessed of or entitled to any debt or sum of money due to him from us or any or either of us on any account whatsoever nor to any leasehold or other personal estate goods chattels or effects in possession or reversion absolutely or contingently or otherwise howsoever.

3.—And we further say that the said testator's funeral expenses have been paid and that the same consist of the items of disbursement numbered and in the account hereinafter referred to [*or if not paid it should be so stated with the amount due and to whom due*].

This should accord with the order directing the account.

4.—And we further say that we have in the account marked A. now produced and shown to us according to the best of our knowledge information and belief set forth a full true and particular account of the personal estate of the said testator *not by him specifically bequeathed* which has come to our hands or to the hands of any or either of us or to the hands of any person or persons by our or any or either of our order or for our or any or either of our use with the times when the names of the persons from whom and on what account the same has been received and also a like account of the disbursements allowances and payments made by us or any or either of us in respect of or on account of the said testator's funeral expenses debts and personal estate together with the times when the names of the persons to whom and the purposes for which the same were disbursed allowed or paid.

5.—And we each speaking positively for himself and to the best of his knowledge and belief as to other persons further say that save and except as appears in the said account marked A. we have not nor hath any or either of us nor have nor hath any other person or persons by our or any or either of our order or for our or any or either of our use possessed received or got in any part of

the said testator's personal estate nor any money in respect thereof and that the said account marked A. does not contain any item of disbursement allowance or payment other than such as has actually been disbursed paid or allowed on the account aforesaid. Regulations as to business, August 8, 1857.

6.—And we further say that to the best of our knowledge information and belief the personal estate of the said testator now outstanding or undisposed of consists of the particulars set forth in the second schedule hereunder written.

7.—And we further say that save what is set forth in the said second schedule there is not to our knowledge information or belief any part of the said testator's personal estate now outstanding or undisposed of.

8.—And we further say that we have according to the best of our knowledge remembrance information and belief set forth in the third schedule hereunder written the particulars of all the real estate which G. H. the testator in the decree [*or*, order] dated made in this cause named or referred to and who died on the day of was seised of or entitled to at the date of his will and at the time of his death [*or if the testator acquired any estates after the date of his will as follows*—in the first part of the third schedule hereunder written the particulars of all the real estate which G. H. the testator &c. [*as above*] was seised of or entitled to at the date of his will and in the first and second parts of such schedule the particulars of all the real estate which the said testator was seised of or entitled to at the time of his death]. This should accord with the order.

9.—And we further say that save what is set forth in the said schedule the said testator was not to the best of our knowledge information or belief at the date of his will or at the time of his death seised of or entitled to any real estate in possession remainder or reversion absolutely or contingently or otherwise howsoever.

10.—And we further say that we have according to the best of our knowledge information and belief set forth in the fourth schedule hereunder written the particulars of all the incumbrances affecting the said testator's real estate and what part thereof such incumbrances respectively affect.

11.—And we further say that we have in the account marked B. now produced and shown to us according to the best of our knowledge information and belief set forth a full true and particular account of all the rents and profits of the said testator's real estate which has come to our hands or to the hands of any or either of us or to the hands of any person or persons by our or any or either of our order or for our or any or either of our use and the times when the names of the persons from whom on what account in respect of what part of such estate the same have been received and the times when the same became due and also a like account of the disbursements allowances and payments made by us or any or either of us in respect of the said testator's real estate or the rents and profits thereof and the times when the names of the persons to whom and the purposes for which the same were made. This should accord with the order directing the account.

Regulations as to business, August 8, 1857.

12.—And we each speaking positively for himself and to the best of his knowledge and belief as to other persons further say that save and except as appears in the said account marked B. we have not nor hath any or either of us nor have nor hath any other person or persons by our or any or either of our order or for our or any or either of our use possessed received or got in any rents or profits of the said testator's real estate nor any money in respect thereof and that the said account marked B. does not contain any item of disbursement payment or allowance other than such as has actually been disbursed paid or allowed as above stated.

The first Schedule above referred to.

1. £50 cash in the house.
2. £100 cash at the testator's bankers Messrs. A. and B.
3. £1000 £3 per cent. Bank Annuities standing in the testator's name.
4. £10 due from John James for half year's rent of house at to Michaelmas 1850.
5. £32 6*s.* 8*d.* balance remaining due from John Thomas on account of half year's rent of farm at to Michaelmas 1850.
6. £300 a debt due from Samuel Jones on a bond with interest from at per cent.
7. A leasehold house situate at held under a lease for a term of which will expire on at a rent of £ a year underlet to James Evans for a term which will expire on at a rent of £50 a year.
8. £25 half a year's rent due from the said James Evans to

The second Schedule above referred to.

[The particulars to be set forth in the same manner as above.]

The third Schedule above referred to.

[To contain a short particular of the real estate.]

The fourth Schedule above referred to.

[To contain a short particular of the incumbrances and showing what part of the above real estate is subject to each.]

No. 7—*Ordinary Conditions of Sale.*

Conditions of Sale.

1.—No person is to advance less than £ at each bidding.

2.—The sale is subject to a reserved bidding for each lot which has been fixed by the judge to whose court this cause is attached.

3. Each purchaser is at the time of sale to subscribe his name and address to his bidding and the abstract of title and all written

notices and communications and summonses are to be deemed duly delivered to and served upon the purchaser by being left for him at such address unless or until he is represented by a solicitor. Regulations as to business. August 8, 1857.

4.—Each purchaser is at the time of sale to pay a deposit of £ per cent. on the amount of his purchase money to the person appointed by the said judge to receive the same. To be inserted only when a deposit directed, in which case the person appointed to receive the deposit must give security.

5.—The chief clerk of the said judge will after the sale proceed to certify the result and the day of at of the clock noon is appointed as the time at which the purchasers may if they think fit attend by their solicitors at the chambers of the said judge at in the county of Middlesex to settle such certificate. The certificate will then be settled and will in due course be signed and filed and become binding without further notice or expense to the purchasers.

6.—The vendor is within four days after such certificate has become binding to deliver to each purchaser or his solicitor an abstract of the title to the lot or lots purchased by him subject to the stipulations contained in these conditions. And each purchaser is within four days after the actual delivery of the abstract to deliver at the office of solicitor at in the county of a statement in writing of his objections and requisitions (if any) to or on the title as deduced by such abstract and upon the expiration of such last-mentioned time and in this respect time is to be deemed of the essence of the contract the title is to be considered as approved of and accepted by such purchaser subject only to such objections and requisitions if any.

7.—Each purchaser is in addition to the amount of his bidding at the sale to pay the value of all timber and timber-like trees tellers and pollards if any on the lot purchased by him down to 1s. per stick inclusive the amount thereof to be ascertained by a valuation to be made in manner following that is to say each party (vendor and purchaser) or their respective solicitors is within days after the chief clerk's certificate has become binding to appoint by writing one valuer and give notice in writing to the other party of such appointment and the valuers so appointed are to make such valuation but before they commence their duty they are to appoint an umpire by writing and the decision of such valuers if they agree, or of such umpire if they disagree is to be final and in case the purchaser shall neglect or refuse to appoint a valuer and give notice thereof in the manner and within the time above specified the valuation is to be made by the valuer appointed by the vendor alone and his valuation is to be final.

8.—Each purchaser is under an order for that purpose to be obtained by him or in case of his neglect by the vendors at the costs of the purchaser upon application at the chambers of the said judge to pay the amount of his purchase-money (*after deducting the amount paid as a deposit*) *together with the amount of the valuation under the 7th condition if any* into the Bank of England with the To be altered if the 4th or 7th condition not inserted.

Regulations as to business. August 8, 1857.

privity of the Accountant-General of this court to the credit of this cause . . . on or before the said . . . day of and if the same is not so paid then the purchaser is to pay interest on his purchase money including the amount of such valuation at the rate of £ per cent. per annum from the day of to the day on which the same is actually paid deducting property tax. Upon payment of the purchase-money in manner aforesaid the purchaser is to be entitled to possession or to the rents and profits as from the day of down to which time all outgoings are to be paid by the vendors.

This to be in accordance with the order directing the sale.

9.—If any error or misstatement shall appear to have been made in the above particulars such error or misstatement is not to annul the sale or entitle the purchaser to be discharged from his purchase but a compensation is to be made to or by the purchaser as the case may be and the amount of such compensation is to be settled by the said judge at chambers.

[*Add to these such conditions respecting the title and title deeds as the conveyancing counsel shall advise to be necessary or proper.*]

Lastly.—If the purchaser shall not pay his purchase-money at the time above specified or at any other time which may be named in any order for that purpose, and in all other respects perform these conditions an order may be made by the said judge upon application at chambers for the resale of the lot purchased by such purchaser and for payment by the purchaser of the deficiency if any in the price which may be obtained upon such resale and of all costs and expenses occasioned by such default.

No. 8.—*Affidavit of Result of Sale.*

In Chancery.

[Title.]

I A B. of &c. auctioneer the person appointed by the judge to whose court this cause is attached to sell the estates comprised in the particulars hereinafter referred do make oath and say as follows :—

This exhibit is to be the print signed by the chief clerk.

1.—I say that I did at the time and place in the lots and subject to the conditions specified in the particulars and conditions of sale now produced and shown to me and marked with the letter A. put up for sale by auction the estates described in such particulars and that the result of such sale is truly set forth in the bidding paper marked with the letter B. now produced and shown to me.

To be used if any lot sold.

2.—I further say that the sums set forth in the second column of such bidding paper are the highest sums bid for the respective lots the numbers of which are set forth in the first column opposite to such respective sums and that the persons whose names are subscribed in the third column of such bidding paper as purchasers

were respectively the highest bidders for and became the purchasers of the respective lots and numbers whereof are set opposite to such respective names in the said first column of the said bidding paper at the prices or sums set opposite to their respective names in the said second column thereof. Regulations as to business. August 8, 1857.

3.—I further say that the several lots opposite to the numbers of which I have in the third column of the said bidding paper written the words "not sold" were not sold no person having bid a sum equal to or higher than the reserved bidding fixed by the said judge. To be used if any lot bid for but not sold.

4.—I further say that no person bid any sum whatever for either of the lots opposite the numbers of which I have in the second column of the said bidding paper written the words no bidding. To be used if any lot not bid for.

5.—I further say the said sale was conducted by me in a fair open and candid manner and according to the best of my skill and judgment.

6.—I further say that I have received the sums set forth in the fourth column of the schedule hereto as deposits from the respective purchasers whose names are set forth in the second column of such schedule opposite the said respective sums in respect of their said respective purchase monies set forth in the third column of the said schedule opposite such names for the respective lots the numbers of which are set forth in the first column of the said schedule opposite to such respective names leaving due in respect of the purchase monies set forth in the said third column the respective sums set forth in the fifth column of the said schedule. To be used when the conditions require a deposit, and to be deposed to by the person appointed to receive the deposits.

The Schedule above referred to.

No. of Lot.	Name of purchaser.	Amount of Purchase Money.	Amount of Deposit received.	Amount remaining due.

Regulations as to business. August 8, 1857.

No. 9.—*List of Debts allowed.*

JAMES *v.* JONES.

LIST OF DEBTS.

No. of Entry of Claim.	Names of Creditors.	Addresses.	Amounts allowed for Principal, Interest, and Costs.	Total amounts due.
			£ s. d.	£ s. d.
2	James Allen .	Boston in the County of Lincoln, Surgeon	100 0 0	
		Interest . . .	4 0 0	
		Costs	2 2 0	
				106 2 0
1	Charles Cohen	98, Piccadilly, in the County of Middlesex, Gentleman, Executor of John Thomas	67 0 0	
		Interest from 5th October, 1850, at £5 per Cent.	4 2 0	
		Costs	2 2 0	
				73 4 0
5	John Dennis and Owen Thomas . .	16, Fleet Street, London, Grocers and Co-partners .	100 0 0	
		Interest from 16th October, 1852, at £5 per Cent. . . .	5 0 0	
		Another debt . .	62 0 0	
		Interest . . .	2 10 0	
		Costs	2 4 6	
				171 14 6
			Total £	

NOTE.—The names are to be inserted alphabetically.

Where the debt does not carry interest, but interest is allowed under the General Order xlii. 9, *ante*, it is to be stated as in the first example above. If the debt carries interest, the rate and time from which it is computed is to be stated, as in the second example.

As in all cases the interest is computed to the date of the certificate, this need not be stated.

When there are both specialty and simple contract debts, separate lists are to be prepared.

Regulations as to business. August 8, 1857.

No. 10.—*List of Legacies remaining unpaid.*

JAMES *v.* JONES.

LIST OF LEGACIES.

	Names of Legatees.	Descriptions.	Amounts of Principal and Interest.	Total amounts due.
			£ s. d.	£ s. d.
	James Oliver .	Son of Testator, an Infant	100 0 0	
		Interest . . .	7 5 6	107 5 6
	Mary Russell .	of 20, Cheapside, London, Widow .	50 0 0	
		Interest from 1st January, 1850, the death of Testator . .	4 8 0	54 8 0
	Jane, the Wife of John Williams . . .	of Lincoln, Esq.	250 0 0	
		Paid in part . .	50 0 0	
			200 0 0	
		Interest . . .	14 11 0	214 11 0
			Total £	

NOTE.—Where the interest is to be computed from the end of one year after testator's death, it is to be stated as in the first example above. If otherwise, the time from which it is payable is to be stated. As in all cases interest is computed to the date of the certificate, this need not be stated.

Regulations as to business. August 8, 1857.

No. 11.—*List of Annuities and Arrears due.*

LIST OF ANNUITIES.

	Names of Annuitants.	Description of Annuitants and Nature of Annuities.	Amounts of Annuities.	Amounts of Arrears due.
			£ s. d.	£ s. d.
	Mary Jones .	Spinster, Daughter of Testator, during her Life . . .	50 0 0	25 0 0
	Maria Williams	Widow of Testator, during her Life and Widowhood .	200 0 0	
		Arrears due from 7th Aug. 1852, down to which it has been paid .	. . . .	300 0 0
		Totals £		£

Note.—The arrears to be explained as in the second Example, if due from any other period than that of the testator's death.

Regulations as to business. August 8, 1857.

No. 12.—*List of Apportionments among Creditors of Legatees.*

APPORTIONMENT AMONG CREDITORS (OR LEGATEES).

	Names of Creditors (or Legatees).	Addresses.	Amounts before certified to be due, and subsequent Interest.	Totals due.	Amounts apportioned.
			£ s. d.	£ s. d.	£ s. d.
	John Jones	20, Cheapside, London, Woollendraper . .	200 0 0		
		Subsequent Interest . . .	17 10 0		
				217 10 0	57 4 8
	Thomas Young and Robert Young.	Braintree, in the County of Essex, Executors of William Young, deceased . .	200 0 0		
		Subsequent Interest . . .	17 10 0		
				217 10 0	57 4 8
				Total £	

NOTE.—The names of the creditors or legatees to be stated in same order as in the certificate from which they are taken.

Regulations as to business. August 8, 1857.

No. 13.—*Receiver's Recognizance.*

of of and of

Before our Sovereign Lady the Queen in her High Court of Chancery personally appearing, do acknowledge themselves and each of them doth acknowledge himself to owe to the Right Honourable the Master of the Rolls, and the Senior Vice-Chancellor of the said court, the sum of of good and lawful money of Great Britain, to be paid to the said and or one of them, or the executors or administrators of them or one of them, and unless they do pay the same they the said are willing and do grant and each of them is willing and doth grant, for himself, his heirs, executors, and administrators, that the said sum of shall be levied, recovered, and received of and from them and each of them and of and from all and singular the manors, messuages, lands, tenements, and hereditaments, goods and chattels of them and each of them wheresoever the same shall or may be found. Witness our said Sovereign Lady Victoria by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, defender of the faith and so forth, at Westminster, the day of in the year of her reign, and in the year of our Lord 186 .

v.

The , the judge to whose court this cause is attached, has approved of and allowed this recognizance. , Chief Clerk.

WHEREAS by an order of the High Court of Chancery made in a cause wherein are plaintiffs and defendants, and bearing date the day of IT WAS ORDERED that a proper person should be appointed to receive [*or that upon the above bounden first giving security, he should be appointed receiver of*] the rents and profits of the real estate, and to collect and get in the outstanding personal estate of in the said order named. AND WHEREAS the judge to whose court this cause is attached hath [*approved of the said as a proper person to be such receiver, and hath*] approved of the above bounden and as sureties for the said and hath also approved of the above written recognizance with the underwritten condition as a proper security to be entered into by the said and pursuant to the said order and the general orders of the said court in that behalf; and in testimony of such approbation the chief clerk of the said judge hath signed an allowance in the margin hereof.

To accord with the order.

NOW THE CONDITION of the above-written recognizance is such that if the said do and shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the real estates and in respect of the personal estate of the said at such periods

as the said judge shall appoint, and do and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court or judge hath directed, or shall hereafter direct, then the above recognizance shall be void and of none effect, otherwise the same is to be and remain in full force and virtue.

Regulations as to business. August 8, 1857.

Taken and acknowledged by the above-named, &c.

No. 14.—*Receiver's Account.*

[TITLE.]

IN CHANCERY.

To accord with the Order.

The [ ] Account of A. B. the Receiver appointed in this Cause by [*or* pursuant to] an order made in this Cause, dated the day of , *to receive the rents and profits of the Real Estate, and to collect and get in the outstanding Personal Estate* of C. D., the testator [*or*, intestate] in this Cause, named from the day of to the day of

REAL ESTATE—RECEIPTS.

No. of Item.	Date when received.	Tenants' Names.	Description of Premises.	Annual Rent. £	s.	d.	Arrears due at . . £	s.	d.	Amount due at . £	s.	d.	Amount received. £	s.	d.	Arrears remaining due. £	s.	d.	Observations.
1		John Jones .	Home Farm in the Parish of Norton, in the County of Oxford																
2		Thomas Jones	House at Norton, aforesaid																

PAYMENTS AND ALLOWANCES ON ACCOUNT OF REAL ESTATE.

No. of Item.	Date of Payment or Allowance.	Names of Persons to whom paid or allowed.	For what Purpose paid or allowed.	Amount. £	s.	d.
1		Sun Fire Office . . .	One year's Insurance of, due			
2		Thomas Carpenter . .	Bill for repairs at house let to Thomas Jones . . .			
3		James Francis . . .	Allowance for a half-year's Income Tax, due . . .			
			Total payments . . £			

RECEIPTS ON ACCOUNT OF PERSONAL ESTATE.

No. of Item.	Date when received.	Names of Persons from whom received.	On what Account received.	Amount received.

PAYMENTS AND ALLOWANCES ON ACCOUNT OF PERSONAL ESTATE.

No. of Item.	Date when paid or allowed.	Names of Persons to whom paid or allowed.	For what Purpose paid or allowed.	Amount paid or allowed.

SUMMARY.

	£ s. d.	£ s. d.
Amount of balance due from Receiver on account of Real Estate on last account	,, ,,	
Amount of Receipts on the above Account of Real Estate	,, ,,	
Balance of last Account paid into Court	£ s. d.	
Amount of Payments and Allowances on the above account of Real Estate	,, ,,	
Amount of Receiver's Costs of passing this account as to Real Estate	,, ,,	
Balance due from the Receiver on account of Real Estate		£

	£ s. d.	£ s. d.
Amount of balance due from Receiver on last Account of Personal Estate	,, ,,	
Amount of Receipts on the above Account of Personal Estate	,, ,,	
Balance of last Account paid into Court	£ s. d.	
Amount of Payments and Allowances on the above Account of Personal Esttae	,, ,,	
Amount of Receiver's Costs of passing this Account as to Personal Estate	,, ,,	
Balance due from the Receiver on account of Personal Estate		£

Regulations as to business. August 8, 1857.

No. 15.—*Receiver's Costs of Appointment and passing Account.*

TERM 186 .

	Lower Scale.	Higher Scale.
Instructions for drawing and engrossing recognizance	1 15 0	2 12 6
Attending summons when same settled and attending at judge's chambers for allowance thereof		
Copies of draft for parties to whom copies are directed to be handed . . .		
Paid for stamp and parchment . .	2 0 0	2 0 0
Instructions for affidavits of sureties .	0 6 8	0 6 8
Drawing and engrossing same fo. 4 .	0 5 4	0 5 4
Attending sureties on their being sworn thereto	0 6 8	0 6 8
Paid oaths filing and for office copy .		
Making appointment with receiver and his sureties and attending them on acknowledging recognizance . .	0 13 4	0 13 4
Paid thereon		
Attending to enrol recognizance . .	0 6 8	0 6 8
Paid enrolling	0 7 6	0 7 6
Attending at judge's chambers when order appointing receiver made . .	0 6 8	0 13 4
Paid for order	0 10 0	1 0 0
Attending passing and to enter same .	0 6 8	0 13 4
Copy order for the judge	0 2 6	0 2 6
Letters, &c.	0 5 0	0 5 0
If the order appoints the receiver subject to his giving security, the following will be the charges in lieu of the above :—		
Copy order for the judge . . .	0 2 6	0 2 6
Preparing summons to proceed and attending to get same filled up and sealed at chambers	0 6 8	0 6 8
Paid stamp	0 1 0	0 3 0
Copy summons to leave at chambers .	0 2 0	0 2 0
Copies to serve and service thereof on parties having leave to attend . .		
Attending thereon	0 6 8	0 13 4
The same charges as above relating to the recognizance.		
Making copy certificate fo. 6 . .	0 2 0	0 2 0
Copies for the parties to whom copies are directed to be handed . . .		
Attending adjourned summons when certificate settled	0 6 8	0 13 4

	Lower Scale.			Higher Scale.			Regulations as to business. August 8, 1857.
Transcribing certificate	0	2	0	0	2	0	
Paid for stamp	1	0	0	1	0	0	
Attending appointment to sign	0	6	8	0	6	8	
Attending to bespeak and for office copy certificate	0	6	8	0	6	8	
Paid for office copy	0	2	0	0	2	0	
Letters, &c.	0	5	0	0	5	0	

TERM 186 .

Drawing receiver's 1st account and copy fo. per folio	0	0	8	0	1	4	
Preparing summons to proceed thereon and attending to get same filled up and sealed at chambers	0	6	8	0	6	8	
Paid stamp	0	1	0	0	3	0	
Copy summons to leave at chambers	0	2	0	0	2	0	
Copies and services on plaintiff and each defendant having leave to attend							
Copies of account for parties to whom copies are directed to be handed							
Attending summons when account passed and costs settled							
Entering account and duplicate in books							
Paid for books							
Instructions for affidavit verifying account and duplicate	0	6	8	0	6	8	
Drawing and engrossing same fo. 5	0	6	8	0	6	8	
Preparing two exhibits	0	2	0	0	2	0	
Attending receiver on his being sworn	0	6	8	0	6	8	
Paid oath and two exhibits							
Paid filing and for office copy	0	4	2	0	4	2	
Making copy draft certificate of passing account fo. 8	0	2	8	0	2	8	
Copies for parties to whom copies are directed to be handed							
Attending settling draft certificate	0	6	8	0	13	4	
Transcribing certificate	0	2	8	0	2	8	
Paid stamp	1	0	0	1	0	0	
Paid per centage on £							
Attending appointment to sign certificate	0	6	8	0	6	8	
Attending to bespeak and for office copy	0	6	8	0	6	8	
Paid for office copy	0	2	8	0	2	8	
Drawing this bill of costs and copy fo. 8	0	5	4	0	5	4	
Copies for parties to whom copies are directed to be handed							
Attending to procure balance to pay into court	0	6	8	0	6	8	

Regulations as to business. August 8, 1857.

	Lower Scale.	Higher Scale.
Attending Accountant-General for directions to pay balance into the Bank and attending to pay same and to file cashier's receipt—as allowed by regulations as to fees and charges, *ante* .		
Paid for office copy certificate of payment	0 1 8	0 1 8
Letters, &c.	0 5 0	0 10 0

No. 16.—*Plaintiff's or Defendant's Costs of passing Receiver's Account.*

TERM 186 .

	Lower Scale.	Higher Scale.
Attending summons when account passed and costs settled		
Attending settling certificate . .	0 6 8	0 13 4
Drawing this bill of costs and copy fo. 4	0 2 8	0 2 8
Copies for parties to whom copies are directed to be handed		
Attending appointment to sign certificate	0 6 8	0 6 8
Letters, &c.	0 5 0	0 5 0

No. 17.—*Affidavit verifying Receiver's Report.*

In Chancery.

[TITLE.]

I of the receiver appointed in this cause, make oath and say as follows:

1.—I say that the account contained from page to page both inclusive in each of the two several books marked with the several letters A. and B. produced and shown to me at the time of swearing this my affidavit, and purporting to be my account of *the rents and profits of the real estate and of the outstanding personal estate of the testator* [*or*, intestate] *in this cause* from the day of 18 , to the day of 18 , both inclusive, doth contain a true account of all and every sum and sums of money received by me, or by any other person or persons by my order, or to my knowledge or belief, for my use on account or in respect of the *said rents and profits accrued due on or before the said day of or on account or in respect of the said personal estate*, other than and except what is included as received in my former account [*or* accounts] sworn to by me.

This is to accord with the order appointing the receiver.

The day to which the account is made up.

2.—And I further say that the several sums of money mentioned in the said account hereby verified to have been paid and

allowed to have been actually and truly so paid and allowed for the several purposes in the said account mentioned.

3.—And I further say that the said account is just and true in all and every the items and particulars therein contained, according to the best of my knowledge and belief.

Regulations as to business. August 8, 1857.

No. 18—*Affidavit verifying Abstract.*

In Chancery.

[Title.]

I A. B. of &c.
solicitor for
in this cause [*or*, matter] make oath and say as follows :

1.—I say that I have carefully examined and compared the abstract written on sheets of paper now produced and shown to me at the time of swearing this affidavit and marked with the letter A. with the several deeds and documents thereby purported to be abstracted and that such abstract is a true and correct abstract of the said deeds and documents so far as such deeds and documents relate to the hereditaments referred to in an order made in this cause [*or*, matter] dated the day of

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No. 19.—*Affidavit verifying Engrossments of Deeds.*

In Chancery.

[Title.]

I A. B. of &c. make oath and say as follows :

1.—I say that I have carefully examined and compared the parchment writing now produced and shown to me at the time of swearing this affidavit and marked with the letter A. with the draft or paper writing now produced and shown to me at the time of swearing this affidavit and marked with the letter B. being the draft of the conveyance [*or*, settlement, &c.] settled at the chambers of the judge to whose court this cause [*or* matter] is attached pursuant to the order made in this cause [*or* matter] dated . And I say that the said parchment writing is a true and correct transcript and engrossment of the said draft.

Registrars' Regulations. March 15, 1860.

REGULATIONS

Of the Registrars of the Court of Chancery respecting the transaction of Business in their Office, issued March 15, 1860.

SETTING DOWN CAUSES, PLEAS, DEMURRERS, AND OTHER MATTERS FOR HEARING.

Generally.

1. Pleas, Demurrers, Exceptions for Insufficiency or Scandal, Motions for a Decree, Original Causes, Special Cases, Causes for further consideration, and Appeals and Rehearings, are to be set down by the Registrar's Clerk at the order of course seat on the same day the order, petition, Record and Writ Clerks' certificate, request or other document required for that purpose, is produced to or left with him; and he is to retain any such petition, certificate, or request for filing.

Pleas and demurrers. Cons. Ord. 21, rule 9; Cons. Ord. 14, rules 14, 15, 17.

2. Pleas and Demurrers filed in Causes attached to the Rolls Court are to be set down upon production of an order drawn up by the Secretary to the Master of the Rolls.

3. Pleas and Demurrers filed in Causes attached to the Courts of the Vice-Chancellors are to be set down upon an order to be drawn up by the Registrar on petition of course to the Lord Chancellor, and dated the day the petition is left. The petition (which does not require any fiat from the Lord Chancellor, nor any stamp) must state the day when the plea or demurrer was filed, and whether it be to the whole or part of the bill, and be subscribed by the solicictor in the form following, that is to say :—

A. B., Plaintiff's (*or* Defendant's) Solicitor.

1st March, 1860.

4. Pleas and Demurrers are to be set down within the following times (exclusive of vacations) after the same are filed, that is to say :—

Demurrers to whole Bill	12 days.
Demurrers to part of Bill and pleas to whole or part of Bill	3 weeks.

Exceptions for insufficiency or scandal. Cons. Ord. 16, rule 10.

5. Exceptions to answers for insufficiency, or to any pleading or other matter for scandal, are to be set down upon production of the Record and Writ Clerk's certificate of the filing thereof, endorsed by the solicitor of the party filing the same with a request for that purpose, in the form following, that is to say :—

"I request that the exceptions referred to in this certificate may be set down for hearing."

A. B., Plaintiff's (*or* Defendant's) Solicitor.

1st March, 1860.

6. [Motions for a Decree are to be set down within seven days after the notice is served (*a*), upon production of the Record and Writ Clerk's certificate that the Cause is in a fit state to enable the plaintiff to move for a Decree, indorsed by the plaintiff's solicitor with a memorandum of the date when the notice was served, and the date when it will expire, and if there be any Infant Defendant stating that a guardian *ad litem* has been appointed; or if there be not, stating that there is not, any Infant Defendant. After the seven days have expired the motion is not to be set down without the consent in writing of the defendant's solicitors.] The memorandum may be in the form following, that is to say,— Registrar's Regulations, March 15, 1860. Motions for decree. Cons. Ord. 33, rule 9; Cons. Ord. 37, rule 10.

Notice served day of
expires day of
(*i.e.* one lunar month after service).
"A Guardian *ad litem* has been appointed to the Infant Defendant A. B."

or,

"There is not any Infant Defendant."
C. D., Plaintiff's Solicitor.
1st March, 1860.

(*a*) See now as to the time for setting down motions for decree, Ord. 22 Nov. 1866, r. 2, p. 647, *ante*, and note (*k*) to Ord. XXXIII. 9, p. 534, *ante*.

7. Causes are to be set down for original hearing upon production of the Record and Writ Clerk's certificate (*b*) that the cause is in a fit state to be set down for hearing, indorsed by the solicitor of the party setting down the same with a memorandum stating, if there be any Infant Defendant, that a Guardian *ad litem* has been appointed; or if there be not, stating that there is not, any Infant Defendant. The memorandum may be in the form following, that is to say:— Original causes. Cons. Ord. 6, rules 2, 3.

"A Guardian *ad litem* has been appointed to the Infant Defendant A.B."

or,

"There is not any Infant Defendant."
A.B., Plaintiff's Solicitor.
1st March, 1860.

(*b*) See as to the time when the certificate may be given, Ord. 22 Nov. 1866, r. 3, p. 647, *ante*.

8. If all parties are not *sui juris*, special cases are to be set down upon production of an order for leave to set down the same; —or if all parties are *sui juris*, upon production of the Record and Writ Clerk's certificate, indorsed by the solicitor with a memorandum to that effect, in the form following:— Special cases. Act 13 & 14 Vict. c. 35, ss. 12, 13.

"All parties are *sui juris*."
A. B., Plaintiff's Solicitor.
1st March, 1860.

Registrar's Regulations, March 15, 1860.

Causes for further consideration. Cons. Ord. 21, rule 10.

9. Causes for further consideration are to be set down, after the expiration of eight days and within fourteen days from the filing of the Chief Clerk's certificate, upon production of the written request of the plaintiff or party having the conduct of the cause; and after the expiration of the fourteen days, upon production of the written request of the solicitor for the plaintiff or any other party desiring to have the same set down; and in either case upon production of the decree or order adjourning further consideration or an office copy thereof, and an office copy of the Chief Clerk's certificate, or a memorandum of the date when such certificate was filed, indorsed on the request by the Clerk of Reports. The request may be in form following, that is to say:—

"In Chancery,

"A. *v.* B.

"I request that this cause, the further consideration whereof was adjourned by order of the day of may be set down for further consideration before his Honour the Vice-Chancellor Kindersley,

"C. D.,

"Plaintiff's (*or* Defendant's) Solicitor.

"1st March, 1860."

Marking causes and motions for decree "short." Cons. Ord. 21, rule 10.

10. Causes for original hearing, or further consideration, and Motions for a Decree, may be marked "*Short*" (*b*), on production of the certificate of the plaintiff's counsel that the cause or motion is fit to be so heard, without the consent of the solicitors for any of the defendants; but will not be so marked in the case of causes for original hearing for any day before the day when the subpœna to hear judgment is returnable; or in the case of causes for further consideration until after the expiration of ten days; or in the case of motions for decree for any day before the day for which the notice of motion is given; unless in either case by consent of all parties.

(*b*) See p. 472, *ante*.

Appeal motions.

11. Appeal motions are to be set down at least two clear days before the day for which the notice is given, upon production of the order appealed from, or an office copy thereof, and a copy of the notice of motion, which is to be filed.

Re-hearings and appeals. Cons. Ord. 31, rules 4, 5.

12. Petitions for a rehearing before either of the Vice-Chancellors or before the Lord Chancellor or Lords Justices, and petitions of appeal are to be set down upon an order to be drawn up by the Registrar pursuant to the fiat of the Lord Chancellor inscribed on the petition, and upon payment of the usual deposit. Petitions for a rehearing before the Master of the Rolls are to be set down upon an order drawn up by his secretary, and upon payment of the usual deposit. All petitions of appeal or rehearing are to be marked in the Cause-book as not to be in the paper for hearing before the expiration of six clear days from the day of setting down.

13. Upon production to the Registrar of a request or consent signed by the solicitors of all parties, at the latest in the forenoon of the day before the day the cause is to be in the paper, it will be marked as standing over to a day to be named. If all parties do not consent, application should be made to the Court for that purpose at the latest in the forenoon of the day before the day the cause is to be in the paper; otherwise, if the cause be placed in the paper and called on, it may be struck out, and in that case it must be again set down at the bottom of the list.

Registrar's Regulations, March 15, 1860.

Adjournment. Causes standing over.

14. Where an unopposed petition is directed to stand over without fixing a day for it to be again put into the paper, the Registrar in attendance in Court, upon the written request of the solicitor, will direct the same to be restored to the paper for the following petition day.

Petitions standing over.

DOCUMENTS TO BE LEFT ON BESPEAKING DECREES OR ORDERS (*c*).

Documents to be left on bespeaking decrees or orders.

15. Any documents or evidence required to be produced to the Court should be left with the Registrar on bespeaking the decree or order.

(*c*) See as to drawing up decrees in the Registrar's office, Ord. I., 17—32, p. 373, *ante*.

16. *Whenever* any *fund in Court* is to be *dealt with*,

The Accountant-General's certificate, and, if the funds are restrained by any order, the restraining order, or an office copy thereof.

When fund in court dealt with.

17. *Where payment out of Court* is ordered to legal personal representatives,

The probate, or letters of administration, stamped for a sufficient amount.

Payment out of court to legal personal representatives.

18. Orders for payment of specified sums to the Receiver-General of Inland Revenue, for *Legacy and Succession Duty*, will not be drawn up until the calculation has been examined at the Legacy and Succession Duty Department, and a Certificate obtained of the proper amount payable for duty.

Legacy or succession duty.

19. *If* the decree or order is made in a *cause commenced* subsequently to the 1st day of *Michaelmas Term*, 1852, the reference to the record is to be either inscribed or stamped upon some document in the cause, or upon the brief. If the decree or order is made in a cause commenced prior to the 1st of Michaelmas Term, 1852, a memorandum or certificate is to be indorsed and signed by the solicitor on the brief, in the form following, that is to say :—

"I certify that this cause was commenced previously to the 1st day of Michaelmas Term, 1852."

Reference to the record. Ord. 1, 48.

20. *If* the fees of Court are payable according to the *lower scale* (except on orders on petition or summons, other than summons originating proceedings in chambers), a copy of the certificate for paying the lower scale of Court fees, duly marked by the Clerk of Records and Writs.

Lower scale of fees. Ord. 39, 2, 3. Regulation 3—Art. 3.

Registrar's Regulations, March 15, 1860.

21. *If* any *party or person served does not appear* at the hearing,

An affidavit of service on such party or person.

22. On *bespeaking* any *decree*,

Counsel's Brief, and a print of the Bill, with the Reference to the Record marked thereon, and the correct title of the cause, with the names of the guardians of any infant defendants inserted.

In cases of non-appearance.

Documents to be left on bespeaking decrees or orders.

In addition to the printed copy of the Bill to be left for the use of the Judge previously to the hearing of all causes and motions for a decree (*c*), a printed copy of the Bill is by direction of the Lord Chancellor to be left with the Usher of the Judge for the use of the Registrar in attendance in Court. In case a correct printed copy of the Bill shall have been so left it will not be necessary to leave another printed copy of the Bill on bespeaking the decree.

Decrees.

(*c*) *Two* copies are now required to be left (Chancery notice, Hilary Term, 1860).

If any admissions are to be entered as read.
Ord. 1, 44.

23. *If* any *admissions* are to be entered as read,

The original paper of admissions, signed by the parties or their solicitors, to be indorsed by the Registrar.

The admissions, when so indorsed, are to be filed in the Report Office before the decree is left to be passed, and a memorandum thereof is to be made on the decree by the Clerk of Reports.

Memorandum of service of copy bill on any defendant.

24. *If* a memorandum has been entered of *service* of a *copy of the bill* on any defendant,

The Order to enter the memorandum of service with the Record and Writ Clerk's Certificate of the entry thereof, and of no appearance by the defendant so served.

If traversing note filed and the defendant does not appear.

25. *If* a *traversing note* has been filed, and the *defendant does not appear*,

The Record and Writ Clerk's Certificate that the note has been filed, an affidavit of service of a copy of the note, and of subpœna to hear judgment.

If the bill has been taken pro confesso.

26. If the bill has been *taken pro confesso*,

The Order for the Record and Writ Clerk to attend at the hearing with the Record of the Bill, and any previous orders as to the contempt.

Affidavits read at the hearing.

27. *If* any *affidavits* have been *read* at the hearing,

The Office Copies of such affidavits, and any exhibits therein referred to.

Documents proved at the hearing.

28. *If* any *documents* have been *proved at the hearing*, vivâ voce or by affidavit,

The Order authorising them to be so proved, with the office copies of the affidavits (if any) and the documents proved.

Orders on further consideration.

29. On bespeaking *orders on further consideration*,

Counsel's brief, the original decree or the last order on further consideration, and any subsequent orders to revive or carry on the proceedings, and the office copy of the Chief Clerk's certificate, and office copies of any affidavits, and any exhibits or other evidence used at the hearing.

30. *If* the order deals with any *purchase money*, Registrar's Regulations, March 15, 1860.

A consent brief for the purchaser, or an affidavit of notice to him of the intended application of the purchase money, and that the conveyance has been executed and delivered to him.

Documents to be left on bespeaking decrees or orders.

31. Orders on *motion*,

Counsel's brief, with his indorsement of the Order made; the notice of motion, if any, annexed, and office copies of any affidavits, and any exhibits or other evidence used at the hearing of the motion.

If the order deals with any purchase money.

32. Orders *on petition*,

Orders on motion.

The original petition and Counsel's brief, with his indorsement of the Order made, and any decree, order, or the office copy of any certificate on which the petition is founded, and office copies of any affidavits, and any exhibits or other evidence used at the hearing.

Orders on petition.

33. Under Settled Estates Act,

Under the Settled Estates Act.

In addition to the documents mentioned in Regulation 32, the newspapers containing the advertisement of the petition, and any interlocutory orders that may have been made relating thereto.

34. Under Lands Clauses Act, &c.,

Orders under Acts authorising public works. Cons. Ord. 34, rule 3.

Where the Order deals with any money paid into court by the promoters of any public undertaking to the credit of such undertaking not standing to any separate account, the Accountant-General's certificate of the payment into court of the sum sought to be dealt with, and also the Accountant-General's certificate of the fund in court to the credit of the undertaking; and when the Order directs the carrying over of the money to a separate account, or payment of the same out of court to any person entitled thereto, an affidavit of the petitioner verifying the petition, and negativing any adverse right or claim, in the terms of the Cons. Ord. 34, rule 3, and any other evidence used at the hearing.

35. Winding-up order,

Orders for winding-up companies.

In addition to the documents mentioned in Regulation 32, the affidavit of the service of the petition, and the London Gazette and newspapers containing the advertisement thereof.

36. Orders vacating *receiver's recognisances*,

Orders vacating receiver's recognisances.

An office copy of the receiver's recognisance from the office of the Clerk of Enrolments.

37. Where a fee of less than £3 is payable on any decree or order, such fee will be payable by affixed stamps, and the stamp affixed to the decree or order is to be of an amount corresponding as nearly as practicable with the amount of the stamp which it requires, so that no greater number of adhesive stamps may be affixed thereto than is actually necessary; and solicitors are requested not to cancel any adhesive stamps affixed to decrees and orders drawn up by the Registrars, as such stamps will be cancelled by the Registrar on passing the decree or order.

Fees and stamps.

38. When a decree or order engrossed on an impressed stamp is not paid for within one calendar month from the day on which

Decrees or orders engrossed on

Registrar's Regulations, March 15, 1860.

such decree or order is engrossed, it will be cancelled, and the stamp recovered as spoiled; and in case the party shall afterwards desire to have the decree or order engrossed, he will be required to pay the stationer's charges for the same.

Documents to be left on bespeaking decrees or orders.

impressed stamps to be cancelled if not duly paid for.

Ex parte orders.

Note.—Solicitors and their Clerks, on bespeaking or applying respecting orders made in any *ex parte* matter, are requested to inquire for the same *by the title thereof as it appeared in the Court Paper.* Decrees and orders drawn up by the Registrars will when entered be delivered to the Solicitor having the carriage thereof, with his papers, by the Assistant-Clerks to the Registrars.

Registrars' certificate of sale, transfer, or delivery.

39. Every certificate for sale, transfer, or delivery of any stocks, funds, shares, or securities, before being submitted to the Registrar for signature, is to be examined by one of the Registrar's clerks at the order of course seat, who is to mark the same as examined, and sign his initials at the foot in the left hand margin thereof, thus :

Ex^{d}. A. B.

Certificates under the Cons. Ord. 1, rule 8.

40. The Registrars previously to issuing certificates for the transfer or delivery of stocks, funds, shares, or securities, pursuant to the Cons. Ord. 1, rule 8, will require the following evidence to be produced; and the affidavits of identity may be in the forms given in cases I., II., III., according to the circumstances ;—

Case I.

If the order direct such transfer or delivery to the legal personal representatives of a deceased person named in the order, but without naming such representatives in the order, and any of such representatives be dead, leaving survivors, or a survivor, the probate or letters of administration of the deceased person named in the order, a certificate of the burial of the deceased representative, or an official extract from the Register of Deaths, of his death, and an affidavit of his identity.

Case II.

If the order direct such transfer or delivery to any persons named in the order, as the legal personal representatives of a deceased person, and any of such representatives be dead, leaving survivors, or a survivor, a certificate of the burial of such deceased representative, or an official extract from the Register of Deaths, of his death and an affidavit of his identity.

Case III.

If the order direct such transfer or delivery to any person named in the order, or his legal personal representatives, and such person be dead, the probate, or letters of administration, a certificate of the burial of such deceased person, or an official extract from the Register of Deaths, of his death, and an affidavit of his identity. And if any of the legal personal representatives be also dead, leaving survivors, or a survivor, the further evidence mentioned in *Case I.*

Form of affidavit in Case I.

I (*the deponent*), of, &c., make oath and say that I was well acquainted with A. B. deceased, and that he was the person to

whom the probate of the will (*or*, letters of administration of the effects) of C. D. deceased, the person named in the order dated the day of , was (*or*, were) granted by Her Majesty's Court of Probate (*or as the case may be*), on the day of , jointly with E. F. and G. H., which probate (*or*, letters of administration), marked X is (*or*, are) now produced and shown to me; and that the said A. B. is also the person named in the certificate of burial (*or*, official extract from the Register of Deaths), hereunto annexed.

Registrar's Regulations, March 15, 1860.

Documents to be left on bespeaking decrees or orders.

I (*the deponent*), of, &c., make oath and say, that I was well acquainted with A. B. deceased, the person named in the order dated the day of , as one of the legal personal representatives of C. D. deceased, and that the said A. B. is also the person named in the certificate of burial (*or*, official extract from the Register of Deaths), hereunto annexed.

Form of affidavit in Case II.

I (*the deponent*), of &c., make oath and say, that I was well acquainted with A. B. deceased, the person named in the order dated, &c., and late of, &c. (*following description in probate or administration*), and that probate of the will (*or*, letters of administration of the effects) of the said A. B., was (*or*, were) granted by Her Majesty's Court of Probate (*or as the case may be*), on the day of , to C. D. and E. F., which probate (*or*, letters of administration) marked X is (*or*, are) now produced and shown to me; and that the said A. B. is also the person named in the certificate of burial (*or*, official extract from the Register of Deaths) hereunto annexed.

Form of affidavit in Case III.

Note.—If the person named in the order be dead, and any of his legal personal representatives be also dead, leaving survivors or a survivor, the Forms in Cases III. and I. should be combined and adapted.

An affidavit made by or before an executor or administrator will not be received.

To the Accountant-General of the Court of Chancery.

Short title.

Pursuant to an Order dated, &c., the 1st of the Consolidated Orders, rule 8, an affidavit of, &c., filed the day of the certificate of the burial of A. B. in the said Order named, and the probate of the Will (*or*, letters of administration of the effects) of the said A. B., granted on the day of , to E. F. and G. H., by the Court of Probate (*or, as the case may be*) £ Bank 3 per Cent. Annuities standing, &c., are to be transferred to the said E. F. and G. H.

Form of certificate of transfer to the representative of a person named in an order, but since deceased.

CECIL MONRO,

Senior Registrar.

Registrar's Office,

15*th March*, 1860.

County Courts Equitable Jurisdiction Act, 1865.

THE COUNTY COURTS EQUITABLE JURISDICTION ACT.

28 & 29 VICT. CAP. 99.

An Act to confer on the County Courts (*a*) a limited Jurisdiction in Equity. [*5th July*, 1865.]

WHEREAS it is desirable to confer on the County Courts Jurisdiction in Equity: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Jurisdiction in equity to be exercised in County Courts in certain suits and matters.

1. The county courts held by virtue of an Act passed in the session of Parliament holden in the ninth and tenth years of the reign of Her Majesty, chapter ninety-five, shall have and exercise all the power and authority of the High Court of Chancery (*b*) in the suits or matters hereinafter mentioned; that is to say,

1. In all suits by creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs at law, or next of kin, in which the personal or real or personal and real estate against or for an account or administration of which the demand may be made shall not exceed in amount or value the sum of five hundred pounds:
2. In all suits for the execution of trusts (*c*) in which the trust estate or fund shall not exceed in amount or value the sum of five hundred pounds:
3. In all suits for foreclosure or redemption, or for enforcing any charge or lien, where the mortgage, charge, or lien shall not exceed in amount the sum of five hundred pounds:
4. In all suits for specific performance (*d*), or for the delivering up or cancelling any agreement for the sale or purchase of any property, where the purchase-money shall not exceed the sum of five hundred pounds:
5. In all proceedings under the Trustees Relief Acts, or under the Trustee Acts, or under any of such Acts, in which the trust estate or fund to which the proceeding relates shall not exceed in amount or value the sum of five hundred pounds (*e*):
6. In all proceedings relating to the maintenance or advancement of infants in which the property of the infant shall not exceed in amount or value the sum of five hundred pounds (*e*):
7. In all suits for the dissolution of winding-up of any partnership in which the whole property, stock, and credits of such partnership shall not exceed in amount or value the sum of five hundred pounds:

8. In all proceedings for orders in the nature of injunctions, where the same are requisite for granting relief in any matter in which jurisdiction is given by this Act to the county court, or for stay of proceedings at law to recover any debt provable under a decree for the administration of an estate made by the Court to which the application for the order to stay proceedings is made (*f*). County Courts Equitable Jurisdiction Act, 1865.

(*a*) The court of the sheriff of the City of London was held not a county court under this Act, so as to authorise an appeal from it to the Court of Chancery, though the proceedings therein are (by sect. 4, *infra*) to be conformed to the orders made for the county court, *Harper* v. *Pole*, 3 L. R. Eq. 752; *Gardiner* v. *Cacher Company*, 36 L. J. N. S. 432. Sheriff's Court.

(*b*) The superior courts of equity still retain a concurrent jurisdiction over these matters, however trifling the matter in dispute may be, *Scotto* v. *Heritage*, 3 L. R. Eq. 212; but it is now enacted by 30 & 31 Vict. c. 142, s. 8, p. xcv., *post*, that "where any suit or proceeding is pending in the High Court of Chancery which might have been commenced in a County Court, any of the parties thereto may apply to have it transferred." Concurrent jurisdiction of superior courts.

(*c*) Constructive trusts are within this clause, *Clayton* v. *Renton*, 4 L. R. Eq. 158. Constructive trusts.

(*d*) It is now enacted by 30 & 31 Vict. c. 142, s. 9, p. xcv., *post*, that the jurisdiction under this clause "may be exercised in suits for specific performance of an agreement to *lease* where the subject-matter does not exceed 500*l*. in value; and see *Wilcox* v. *Marshall*, 3 L. R. Eq. 270. Specific performance.

(*e*) Applications under these clauses are to be by petition, C. C. Ord. XI. 1, p. cviii. *post*, and for forms see pp. cxxviii., cxxix., *post*. Money paid in under this clause is to be paid into a post office savings bank, and stocks or securities into the names of the treasurer and registrars of the County Court, 30 & 31 Vict. c. 142, s. 24, p. xcv., *post*. Trustee Relief Act.

(*f*) As to applications under this clause for injunctions, see C. C. Ord. XI. 4, 5, p. cviii., *post*; and as to injunctions generally, see p. 503, *ante*.

2. In all such suits or matters the judge of a county court shall, in addition to the powers and authorities now possessed by him, have all the powers and authorities, for the purposes of this Act, of a judge of the High Court of Chancery; and the treasurer, registrar, and high bailiff shall, in all matters in which the county court has jurisdiction under this Act, discharge any duties which an officer of the Court of Chancery can discharge, either under the order of a judge of such court or the practice thereof, and all officers of the county courts shall in discharging such duties conform to any rules or orders to be framed as hereinafter provided. In matters under this Act, judge and officers of the County Courts to have the powers and authorities of a judge and officers of the Court of Chancery.

3. Any one of the vice-chancellors, on the application at chambers of any party to any suit or matter pending under this Act, shall have power, then and there, or, if he shall think fit, after hearing a summons served upon the other party or parties, to transfer the same to the Court of Chancery, upon such terms, if any, as to security for costs or otherwise, as he may think fit. Power to a Vice-Chancellor to order transfer of suits from County Court to Court of Chancery.

4. The judge and officers of the court held under the provisions of "The London (City) Small Debts Extension Act, 1852," hereinafter called the "City court," shall respectively have and exercise the like jurisdiction, powers, and authorities in all respects (*g*), except the power of appointing officers, as are for the time being possessed and exercised by the judge and officers respectively of a metro- City Small Debts Court to have same jurisdiction in all matters as a Metropolitan County Court.

County Courts Equitable Jurisdiction Act, 1865.

politan county court; and the chief clerk and the chief bailiff of the City court shall henceforth be respectively styled the registrar and high bailiff thereof, the word "registrar" being interpreted to include the assistant clerks, and the words "high bailiff" the bailiffs of the City court; and the fees which may be from time to time taken in a county court in any proceeding in which jurisdiction is hereby given to the judge or officers of the City court shall be taken in the City court, and shall be paid into the general fund thereof, and the judge and officers of the City court shall, out of the said general fund, be respectively paid additional salaries of such amount as the Mayor, Aldermen, and Commons of the city of London, in common council assembled, from time to time shall think fit to direct; and such judge and officers of the City court shall conform to the rules and orders made under the authority of this Act.

(*g*) See note (*a*), *ante*.

Power to judge of a County Court to order any legacy, &c. to which an infant or person beyond the seas may be entitled to be paid into the Bank of England, in accordance with provisions of sect. 32 of 36 G. 3, c. 52.

5. Any legacy or sum of money to which any person who is an infant or absent beyond seas may be found or declared entitled by any county court in any suit or matter under this Act may be ordered by the Court to be paid to the Accountant-General of the Court of Chancery (*h*), in accordance with the provisions of section thirty-two of an Act passed in the session of Parliament held in the thirty-sixth year of the reign of his Majesty King George the Third, chapter fifty-two; and the person ordered to pay the same shall, within such time as the Court shall direct, produce to the registrar of the court the certificate of the Accountant-General of the payment of such money; and if default be made in such payment the judge may direct a warrant of execution to issue to the high bailiff of the court, who by such warrant shall be empowered to levy or cause to be levied by distress and sale of the goods and chattels of such person a sum of money equal in amount to the sum which he was ordered to pay to the said Accountant-General and to the costs incurred by reason of such default, and the sum so levied shall be paid to and be receivable by the said Accountant-General under the direction of the Court; and all amounts so paid or transferred into the Court of Chancery, with any dividends thereon, shall be paid or transferred to the person or persons entitled thereto, or otherwise applied for his or their benefit, on application by summons to one of the vice-chancellors while sitting at chambers.

Legacy Duties Act.

(*h*) See as to this Act, note (*b*), p. 65, *ante*; and Ord. I. 11, p. 370, *ante*; and as to the mode of proceeding under this section, see C. C. Ord. XVII. 6, 7, p. cxiii., *post*: and form 39, p. cli., *post*.

Monies paid into a county court in equitable proceedings are now generally to be paid into a post office savings bank, 30 & 31 Vict. c. 142, s. 26, p. xcvi., *post*.

Act not to impair jurisdiction of Stannaries Court.

6. Nothing in this Act contained shall be construed to impair the jurisdiction of the Stannaries Court, or to give authority to any county court judge to entertain jurisdiction in any case to which the equitable jurisdiction of the said court at present extends.

County Courts Equitable Jurisdiction Act, 1865.

7. Whenever it is required that a jury should be summoned for the trial of any matter arising out of the jurisdiction given to the county courts by this Act, it shall be summoned from the list of jurors in the possession of the registrar of the county court in which the suit or matter has been brought; and all the enactments relating to the summoning, impannelling, and swearing of a jury in a county court, and to the number of the jury and the unanimity of their verdict, shall apply to every jury summoned under this Act; and the duties and obligations of and upon all jurors, suitors, and witnesses, and their liability to penalty and punishment, shall, in any proceeding under this Act, be the same as those created, authorised, and imposed by the several statutes now in force relating to county courts.

Provisions of County Court Acts as to juries, suitors, and witnesses, extended to suitors and witnesses under this Act.

Power to enforce judgments of County Courts in equity.

8. For the due execution of any judgment, decree, or order made under the authority of this Act, or of the rules and orders to be framed as hereinafter provided, the Court shall have power to order, and the registrar upon such order shall have authority to seal and issue, and the high bailiff to execute, any writ or warrant of possession, writ or warrant of execution, or other process of execution for carrying into effect any judgment, decree, or order of the said Court; and such writs, warrants, and processes shall be in the form and executed at the time and in the manner to be set forth in the rules and orders to be framed as hereinafter provided.

Where amount of subject matter of suit exceeds limit of the jurisdiction of County Court, suit may be remitted to Court of Chancery, &c.

9. If during the progress of any suit or matter it shall be made to appear to the Court that the subject matter exceeds the limit in point of amount to which the jurisdiction of the county courts is hereby limited, it shall not affect the validity of any order or decree already made, but it shall be the duty of the Court to direct the said suit or matter to be transferred to the Court of Chancery, and thereupon the said suit or matter shall proceed in such one of the Vice-Chancellors' courts as the Lord Chancellor may by general order direct (*i*); and such Vice-Chancellor shall have power to regulate the whole of the procedure in the said suit or matter when so transferred: Provided always, that it shall be lawful for any party to apply to such Vice-Chancellor at chambers for an order authorising and directing the suit or matter to be carried on and prosecuted in the county court, notwithstanding such excess in the amount of the limit to which jurisdiction in the matter is hereby given to the county courts; and the Vice-Chancellor, if he shall deem it right to summon the other parties or any of them to appear before him for that purpose, after hearing such parties, or on default of the appearance of all or any of them, shall have full power to make such order.

(*i*) By an order of 6 December, 1866, any suit or matter transferred under the provisions of this section is to proceed in the court of the Right Hon. the V.-C. Sir J. Stuart.

The registrar may proceed with any particular account then before him, C. C. Ord. XVIII. p. cxiv., *post*.

For form of order to transfer, see p. cliii., *post*.

County Courts Equitable Jurisdiction Act, 1865.

In what courts proceedings shall be taken.

10. With respect to the court in which proceedings in equity shall be taken—

1. Proceedings under this Act which relate to the recovery or sale of any mortgage, charge, or lien on lands, tenements, or hereditaments shall be taken in that county court within the district of which the lands, tenements, or hereditaments, or any part thereof, are situate :
2. Proceedings under the Trustee Acts, 1850 and 1852, shall be taken in the county court within the district of which the persons making the application, or any of them, reside or resides :
3. Proceedings for the administration of the assets of a deceased person shall be taken in the county court within the district of which the deceased person had his last place of abode in England, or in which the executors or administrators, or any one of them, shall have their or his place of abode :
4. Proceedings in partnership cases shall be taken in the county court within the district of which the partnership business was or is carried on :
5. Proceedings for the specific performance or the delivery up or cancelling of agreements shall be taken in the county court within the district of which the defendants, or any one of them, reside or resides, or carry on or carries on business :
6. Proceedings in any suit or other matter under this Act, which are not otherwise provided for, shall be taken or instituted in the county court within the district of which the defendants, or any or either of them, shall reside or carry on business.

As to transfer of suit from one County Court to another.

11. If during the progress of a suit or matter it shall be made to appear to the Court that the same could be more conveniently prosecuted in some other county court, it shall be competent for the Court to transfer the same to such other county court, and thereupon the suit or matter shall proceed in such other county court.

[Ss. 12—13 relate to the salaries of registrars, high bailiffs, and judges, to be paid out of suitors' fees.]

Judge not obliged to hold courts in the month of September.

14. No judge of any county court shall be obliged to hold any courts during the month of September in any year, unless he shall be ordered by the Lord Chancellor so to do ; and if any judge shall be desirous of holding courts in the said month of September, and of being relieved from the obligation to do so at some other period of the year, it shall be lawful for such judge, with the sanction of the Lord Chancellor, to close the courts upon his circuit for any period or periods of time of which the Lord Chancellor shall approve, not exceeding in the whole four weeks in any one year : Provided always, that every county court shall

always be open for the receipt and payment out of money due under any order of the Court, pursuant to the rules and orders in force for the time being, or for any proceeding in bankruptcy before the registrar. County Courts Equitable Jurisdiction Act, 1865.

15. Such of the judgments and decrees as may be directed by any rule or order shall be registered with the registrar of county court judgments in London in such manner as may be therein directed. As to registry of judgments in London.

16. The county court judges appointed or to be appointed by the Lord Chancellor from time to time to frame rules and orders for regulating the practice of the courts, and forms of proceeding therein, under the thirty-second section of an Act passed in the nineteenth and twentieth years of the reign of her present Majesty, chapter one hundred and eight, shall frame the rules and orders for regulating the practice of the county courts under this Act, and forms of proceedings therein, and from time to time amend such rules, orders, and forms ; and such rules, orders, and forms, or amended rules, orders, and forms, certified under the hands of such judges or of any three or more of them, shall be submitted to the Lord Chancellor, who may allow or disallow or alter the same, and so from time to time ; and the rules, orders, and forms, or amended rules, orders, and forms, so allowed or altered, shall, from a day to be named by the Lord Chancellor, be in force in every county court. Power to frame rules and orders under 19 & 20 Vict. c. 108.

17. The county court judges mentioned in the last section shall be empowered to frame a scale of costs and charges to be paid to counsel and attorneys with respect to all proceedings which are herein authorised to be taken, and from time to time to amend such scale ; and such scale or amended scale, certified under the hands of such judges or any three or more of them, shall be submitted to the Lord Chancellor, who from time to time may allow or disallow or alter the same ; and the scale or amended scale so allowed or altered shall, from a day to be named by the Lord Chancellor, be in force in every county court. Scale of costs to be framed by the judges.

18. If any party in a suit or matter under this Act shall be dissatisfied with the determination or direction of a judge of a county court on any matter of law or equity, or on the admission or rejection of any evidence, such party may appeal (*j*) from the same to the Vice-Chancellor authorised as aforesaid, provided that such party shall, within thirty days after such determination or direction, give notice of such appeal to the other party or his attorney, and also deposit with the registrar of the county court the sum of ten pounds as security for the costs of the appeal ; and the said Court of Appeal may make such final or other decree or order as it shall think fit, and may also make such order with respect to the costs of the said appeal as such court may think proper ; and such orders shall be final : Provided that nothing herein contained shall authorise any party to appeal against any decision of a county court, given upon any question as to the value of any real or personal property, for the purpose of deter- Parties aggrieved may appeal.

County Courts Equitable Jurisdiction Act, 1865.

mining the question of the jurisdiction of the Court under this Act, nor to appeal against the decision of a county court on the ground that the proceedings might or should have been taken in any other county court.

(*j*) See *Cox* v. *Slater*, 14 W. R. 664, and C. C. Ord. XIX. p. cxiv., *post*.

Appeal to be made either to the High Court of Chancery or a Vice-Chancellor.

19. In any case which may be the subject of an appeal under this Act in causes arising within the county palatine of Lancaster, the appeal may be made either to the High Court of Chancery or a Vice-Chancellor thereof, or to the Court of Chancery of the county palatine of Lancaster or the Vice-Chancellor thereof; and that in case of an appeal to the Court of Chancery for the said county palatine or the Vice-Chancellor thereof, the order on such appeal shall have the same effect as if it had been made by a Vice-Chancellor of the High Court of Chancery; but no appeal shall be made to the Court of Chancery of the said county palatine or the Vice-Chancellor thereof unless the consent thereto in writing of the respondent or respondents on such appeal, or of his or their solicitor or solicitors, shall be first obtained.

[S. 20 relates to the compensation to be given to one of the registrars.]

This Act and 9 & 10 Vict. c. 95, and any Act amending or altering the same, to be construed together.

21. This Act and the Act passed in the session of parliament holden in the ninth and tenth years of the reign of her present Majesty, chapter ninety-five, and any Act amending or altering the same, shall be read and construed as one Act, as if the several provisions contained in the said Acts referred to, not inconsistent with the provisions of this Act, were repeated and re-enacted in this Act.

[S. 22 relates to the salary of one of the registrars.]

Commencement of Act.

23. The provisions of this Act shall come into operation on the first day of October, One thousand eight hundred and sixty-five, except the provisions relating to framing a scale of costs and making rules and orders of practice and forms of proceeding, and except the provision which relieves the judges from the obligation of holding courts during the month of September without the order of the Lord Chancellor, which provisions shall come into operation on the passing of this Act.

COUNTY COURT ACTS AMENDMENT ACT, 1867.

County Courts Amendment Act, 1867.

30 & 31 VICT. CAP. 142, SS. 8, 9, 24—27.

An Act to amend the Acts relating to the Jurisdiction of the County Courts. [*20th August*, 1867.]

Proceedings in Equity may be transferred to County Courts which might have commenced therein.

8. Where any suit or proceeding shall be pending in the High Court of Chancery, which suit or proceeding might have been commenced in a county court (*a*), it shall be lawful for any of the parties thereto to apply at chambers to the judge to whose court the said suit or proceeding shall be attached to have the same transferred to the county court or one of the county courts in which the same might have been commenced, and such judge shall have power upon such application, or without such application, if he shall see fit, to make an order for such transfer, and thereupon such suit or proceeding shall be carried on in the county court to which the same shall be ordered to be transferred, and the parties thereto shall have the same right of appeal that they would have had had the suit or proceeding been commenced in the county court.

(*a*) See note (*b*), p. lxxxix., *ante*.

Suits in which Jurisdiction under 28 & 29 Vict. c. 99, may be exercised.

9. The jurisdiction which is given by the Act passed in the session holden in the twenty-eighth and twenty-ninth years of the reign of her Majesty, intituled "An Act to confer on the County Courts a Limited Jurisdiction in Equity," so far as relates to cases coming within the fourth head of the first section of the said Act, may, from and after the passing of this Act, be exercised in all suits for specific performance of or for the reforming, delivering up, or cancelling of any agreement for the sale, purchase, or *lease* of any property (*b*) where, in the case of a sale or purchase, the purchase money, or in case of a lease the value of the property, shall not exceed five hundred pounds.

(*b*) See note (*d*), p. lxxxix., *ante*.

Trustees may pay Trust Monies or transfer Stock and Securities into the Court.

24. Any monies, annuities, stocks, or securities vested in any persons as trustees, executors, administrators, or otherwise, upon trusts within the meaning of an Act passed in the session of Parliament holden in the tenth and eleventh years of the reign of her present Majesty, chapter ninety-six, "for better securing Trust Funds, and for the Relief of Trustees," where the same does not exceed in amount or value the sum of five hundred pounds, upon the filing by such trustees or other persons, or the major part of them, to or with the registrar of the county court within the district of which such persons or any of them shall reside, an affidavit shortly describing the instrument creating the trust according to the best of their knowledge, may in the case of

County Courts Amendment Act, 1867.

money be paid into a *post office savings bank* (*c*) established in the town in which the county court is held in the name of the registrar of such court, in trust to attend the orders of the Court, and upon such persons filing with the registrar the receipt or other document given to them by the officer of the said bank the registrar shall record the same, and give to them an acknowledgment in such form as may be directed by any rule of practice, which acknowledgment shall be a sufficient discharge to such persons for the money so paid, and in the case of *stocks or securities* may be transferred or deposited into or in the names of the *treasurer and registrars* (*c*) of such court, in trust to attend the orders of the Court, and the certificate of the proper officer of the transfer or deposit of such stocks or securities shall be a sufficient discharge to such persons for the stocks or securities so transferred or deposited; provided that where there is not a treasurer a person shall be nominated by rule of practice to whom the transfer or deposit in conjunction with the registrar may be made.

(*c*) See note (*e*) p. lxxxix., *ante*.

Extension of Powers given by 12 & 13 Vict. c. 74, to Court of Chancery to County Courts.

25. For the purposes of the last section all the powers and authorities given to the Court of Chancery by the Act passed in the session of Parliament holden in the twelfth and thirteenth years of the reign of her present Majesty, chapter seventy-four, "For the further Relief of Trustees," shall be possessed and exercised by the county courts, and any order made by virtue of such powers and authorities shall fully protect and indemnify all persons acting under or in pursuance of such order.

Monies paid into a County Court in Equitable Proceedings may be invested in a Post Office Savings Bank.

26. *Any money* paid into a county court in equitable proceedings shall, unless otherwise ordered by the Court, be invested by the registrar of the court in his name as registrar, within forty-eight hours of its payment into court, *in a post office savings bank* established in the town in which the court is held (*d*), without restriction as to amount, and without the declaration required of a depositor in a savings bank; and no part of any money invested in a post office savings bank under this Act shall be paid out to any registrar, except upon an authority addressed to the postmaster general by the commissioners of her Majesty's Treasury.

(*d*) See note (*a*), p. cxii., *post*.

Proceedings in Equity may be commenced by Summons.

27. Any proceeding taken in the county courts under "The County Courts Act, 1865," conferring an equitable jurisdiction on such courts, may, if so directed by rules and orders to be made under such Act, be commenced by summons.

COUNTY COURT ORDERS.

County Court Orders, 1865.

ORDER I.

C. C. Ord. I. Plaint and Summons.

PLAINT AND SUMMONS.

Rule 1. Commencement of suit.

1. All suits under the 1st, 2nd, 3rd, 4th, or 7th clauses of the first section of the Act shall be commenced by filing a plaint in equity in the county court to which jurisdiction in the matter is given by the 10th section of the Act (*a*).

(*a*) See now 30 & 31 Vict. c. 142, s. 27 (last page). For forms of plaint, see pp. cxxiv.—cxxviii. and cxxxi., *post*; and for form of summons on plaint, p. cxxxiii., *post*. The plaint is to be printed or written on foolscap paper, see C. C. Ord. XXIII. 1, p. cxviii., *post*.

Rule 2. Names. C. C. Rules, 1857, No. 34.

2. Every plaint in equity shall state the name, address, and description, of the plaintiff, and of the person intended to be brought before the Court as defendant: and where any party sues or is sued in a representative character, he shall be so described in the plaint; but this rule shall be subject to the 34th rule of "The County Court Rules, 1857" (*b*).

(*b*) See as to describing the plaintiff in a bill, note (*a*), p. ii., *ante*, and compare note (*i*), p. 388, *ante*.

Description of plaintiff, of defendant.

By the county court rule referred to, when the plaintiff is unacquainted with the defendant's christian name, the defendant may be described by his surname, or by his surname and the initial of his christian name, see C. C. Ord. XXIII. 7, *post*.

Rule 3. Plaint.

3. Every plaint in equity shall contain a concise statement of the grounds upon which the plaintiff seeks to obtain relief; and shall ask for the specific relief to which he conceives himself entitled, and also for general relief (*c*).

(*c*) See the forms referred to in note (*a*).

Rule 4. Plaint filed by attorney.

4. Where the plaint is filed by an attorney he shall endorse thereon his name or firm and place of business, and that the plaintiff sues by him as attorney; and where there is more than one plaintiff, and the plaint is not filed by an attorney, the plaintiff who actually files the same shall endorse thereon his name and address (*d*).

(*d*) As to notice when an attorney is changed, see C. C. Ord. XXIII. 4, p. cxix., p. *post*.

Rule 5. Form of plaint.

5. Plaints in equity may be in forms similar to those set out in the schedule to these orders, with such variations as the nature and circumstances of each particular case may require (*e*).

(*e*) See forms referred to in note (*a*).

County Court Orders, 1865.

C. C. Ord. I.

Rule 6. Delivery to registrar and filing of plaints.

6. The plaintiff or his attorney shall deliver at the office of the registrar the plaint, with as many copies thereof as there are persons to be brought before the Court as defendants, and the registrar shall forthwith endorse on the plaint a memorandum of the day on which the same was received by him, and when such plaint shall be so endorsed it shall be taken for all purposes to have been duly filed on the date so endorsed thereon.

Rule 7. Summons on plaint.

7. The registrar shall, on the filing of such plaint, make out a summons to the defendant, or to every defendant where there is more than one, to appear, and submit to the judgment of the Court thereon.

Rule 8. Date and return of summons.

8. The summons shall be in the form in the schedule, and be dated of the day on which the plaint was filed, and may be returnable at any court to be holden not less than one calendar month, nor more than three calendar months from the filing thereof (*f*).

(*f*) See p. cxxxiii., *post*.

Rule 9. Service of summons.

9. The summons, with a copy of the plaint annexed thereto, shall be issued by the registrar to the bailiff forthwith, who shall serve the same within seven days, and the service thereof shall be proved, in conformity with the present practice of the county courts ; provided always, that the Court may, upon facts duly verified by affidavit, allow substituted service where justice requires it (*g*).

(*g*) See further C. C. Ord. XXIII. 14, 15, pp. cxix., cxx. *post* ; and generally for the principles on which substituted service is permitted see note (*b*), p. 419, *ante* ; for form of affidavit in support of application for substituted service, see p. cxxiii., *post*, and for form of order, see *ibid.* ; as to service *on* a party's *attorney* being good service on such party, see C. C. Ord. XXIII. 12, p. cxix., *post*, and as to service being effected by a party's *attorney*, see *ibid.*, r. 13.

Rule 10. Service when defendant is out of jurisdiction of county Court.

10. Where a defendant shall be out of England, the judge, or in his absence the registrar, may, upon an affidavit of the fact, direct the service of the plaint and summons to be effected within such time and in such manner as the judge or registrar may think fit (*h*).

(*h*) For the cases in which service is allowed out of the jurisdiction, see note (*o*), p. 424, *ante*.

C. C. Ord. II. Proceedings after Service.

ORDER II.

PROCEEDINGS AFTER SERVICE.

Rule 1. Admission.

1. Where any defendant desires to admit the truth of the allegations in the plaint, and to submit to the judgment of the Court, he may, at any time before the return day of the original summons, in the presence of a registrar of a county court, or in the presence of one of his clerks, or of an attorney of one of the superior courts, sign an admission in the form contained in the

schedule to these orders (*a*), and the signature of the defendant thereto shall be verified by affidavit, unless signed in the presence of the registrar of the court in which the suit is, or of one of his clerks.

County Court Orders, 1865.
C. C. Ord. II.

(*a*) See forms 17, 18, p. cxxxvi., *post*.

Rule 2. Notice of admission.

2. The admission shall be delivered to the registrar, together with a copy thereof for each of the plaintiffs, or, where the plaint is filed by an attorney, with a copy for such attorney only; and the registrar shall forthwith file the same, and transmit a copy by post to each plaintiff, or the attorney, as the case may be, and after the receipt of such copy the plaintiff shall be entitled to the costs then already incurred, and to the further costs of attending the court and obtaining the decree or order to be made upon such admission, but to no other costs.

Rule 3. Statement in the nature of a disclaimer or answer may be filed by defendant.

3. The defendant may, within eight days after the service of the summons, by a statement in writing signed by him, disclaim any interest in the subject-matter of the suit, or admit or deny any of the statements in the plaint, or raise any question of law on such statements without admitting the truth thereof, or he may state concisely any new fact or document upon which he intends to rely as a defence at the hearing, or which he thinks advisable to bring to the notice of the Court. Provided always, that in exercising his discretion as to costs, the judge shall consider the fact of a defendant having or not having availed himself of the powers given by this rule (*b*).

(*b*) See form 19, p. cxxxvii., *post*.

Rule 4. Statement to be filed.

4. The statement under the last foregoing rule shall be delivered to the registrar, together with a copy thereof for each of the plaintiffs, or where the plaint is filed by attorney, with a copy for such attorney only; and the registrar shall forthwith file the same, and transmit a copy by post to each plaintiff or the attorney, as the case may be.

Rule 5. Statement filed by attorney.

5 Where the statement is filed by an attorney he shall endorse thereon his name or firm and place of business, and that the defendant defends by him; and where it is not filed by an attorney, the defendant who actually files the same shall endorse thereon his name and address.

Rule 6. Dismissal of suit.

6. The plaintiff may at any time before setting down the cause for hearing, by notice in writing delivered at the office of the registrar, require the plaint to be dismissed as against all or any of the defendants, with costs, without prejudice to further proceedings or suits, and such notice shall operate as an order to dismiss accordingly; and the registrar shall forthwith file such notice, and forward a copy thereof by post or otherwise to each of the defendants (*c*).

(*c*) See as to dismissal of suit by plaintiff, note (*o*), p. 491, *ante*.

County Court Orders, 1865.

C. C. Ord. III. Evidence.

ORDER III.

EVIDENCE.

Rule 1. Evidence to be taken vivâ voce.

1. Except where otherwise provided by these orders, the evidence of witnesses shall be taken *vivâ voce* on oath according to the present practice on the hearing of plaints (*a*).

(*a*) For scale of allowances to witnesses, see p. cliv., *post*.

Rule 2. As to admission of documents. 21 & 22 Vict. c. 27, s. 7.

2. Where a party desires to give in evidence any document, he may, not less than five days before the hearing, give notice to any other party in the cause who is competent to make admissions, requiring him to inspect and admit such document ; and if such other party shall not within a reasonable time make such admission, any expense of proving the same at the hearing shall be paid by him, whatever be the result of the cause, unless the Court shall otherwise order ; and no costs of proving any document shall be allowed unless such notice be given, except in cases where, in the opinion of the registrar, the omission to give such notice has been a saving of expense (*b*).

(*b*) See as to notice to admit documents, 21 & 22 Vict. c. 27, s. 7, p. 268, *ante*, and note ; and for form, see form 14, p. cxxxiv., *post*.

Rule 3. Inspection of documents in possession or control of an opposite party. See C. C. Rules 63, 76, and 15 & 16 Vict. c. 86, s. 18.

3. Where a party desires to inspect any document in the possession or under the control of any other party, he may, five days before the hearing, give notice to such other party that he or his attorney desires to inspect the same at any place to be appointed by such other party ; and if such other party shall not appoint a convenient place, or allow the party giving such notice, or his attorney, to inspect such document within three days after receiving such notice, the judge may adjourn the hearing, and make such order as to costs as he shall think fit (*c*).

(*c*) For form of notice to produce, see form 15, p. cxxxv., *post* ; and as to production of documents generally, and non-production of privileged documents, see notes, pp. 172—6, *ante*.

Rule 4. Summons to witness.

4. Where a party requires the attendance of any other party, or of any witness, either to give evidence or to produce documents, he shall apply to the registrar to issue a summons requiring such other party or witness to attend the court or the registrar, as the case may be, or to attend and produce documents ; and such summonses shall respectively be drawn up by the registrar, and be issued by him to the bailiff, who shall serve the same ; and in every summons to produce documents the registrar shall insert a description of the documents required (*d*).

(*d*) See forms 15, 16, p. cxxxv., *post*.

Rule 5. Compulsory production of

5. Where a party served with a summons under the last rule shall not at the hearing produce the documents required, the Court

may, upon admission or proof of the service of such summons within a reasonable time, and that such documents are in the possession of the party so served, and that they relate to the matter then pending before the Court, make an order for their production by him, and the Court may deal with them when so produced, and with all costs occasioned by their non-production, as may appear just: Provided that nothing herein shall prevent the Court from receiving secondary evidence of any document of which notice to produce has been given (*e*). 15 & 16 Vict. c. 86, ss. 18 and 20.

(*e*) See note (*p*), p. 173, *ante*, as to compulsory production of documents.

Rule 6. Documents unobjected to received without formal proof.

6. Where any documents are produced to the Court from proper custody, they shall be read without further proof, if they appear genuine, and if no objection be taken thereto; and if the admission of any document so produced be objected to, the judge may adjourn the hearing, and the party objecting shall pay the costs caused by such objection, in case the same shall afterwards be proved, unless the judge shall otherwise order.

Rule 7. Affidavit.

7. Where the party desires to use at the hearing an affidavit by any particular witness, or an affidavit as to particular facts, he may, ten days before the hearing, give a notice, with a copy of such affidavit annexed, to the party against whom such affidavit is to be used; and unless such last-mentioned party shall within five days give notice to the other party that he objects to the use of such affidavit, he shall be taken to have consented to the use thereof.

Rule 8. Examination de bene esse.

8. Where it shall be necessary to examine a witness *de bene esse*, application upon affidavit shall be made to the judge to appoint an examiner for that purpose (*f*).

(*f*) See note (*t*), p. 184, *ante*.

Rule 9. Special examiner.

9. Upon the application of a party desirous to examine a witness residing out of the jurisdiction of the Court, the judge may, if he thinks fit, appoint the registrar of the court within the district of which such witness resides to take the examination of such witness (*g*).

(*g*) Compare as to special examiners, note (*w*), p. 185, *ante*.

Rule 10. How examination conducted.

10. Where any witness is examined by a registrar he shall be examined on oath, and the registrar shall transcribe the answers of such witness, and the deposition shall be subscribed by the witness and the registrar who shall have so examined him, and shall then be transmitted by post to the registrar of the court in which the suit or proceeding is pending.

Rule 11. Allowance to witnesses.

11. The allowance to be made to witnesses for attendance either before the Court or registrar, shall in no case exceed the highest rate of the allowances mentioned in the scale in the schedule (*h*).

(*h*) See p. cliv., *post*.

County Court Orders, 1865.

C. C. Ord. IV. Hearing.

ORDER IV.

HEARING.

Rule 1. How parties to come prepared.

1. Upon the day on which the summons is returnable all parties shall come to the court prepared, so far as the nature of the case will admit, with evidence to enable the judge to try the whole matter of the suit upon the merits, and then to determine the same by a final decree or to make such decretal order, or give such directions for adding parties to the suit, for making inquiries, taking accounts, realising assets, or doing any act which the judge may consider necessary to enable him to make a final decree upon a day to which the hearing may be adjourned.

Rule 2. Hearing.

2. A suit in equity shall be heard in open court as plaints in the county court are now tried.

Rule 3. Affidavits.

3. Affidavits and depositions used at the hearing shall be read as the evidence of the person by whom they are used.

Rule 4. Decree or decretal order.

4. Upon the hearing the Court may dismiss the suit, or grant the relief asked by the plaint, or any part thereof, or may grant any other relief consistent with the case made by the plaint, or make any order giving directions for, or with respect to, the prosecution of the suit, as the circumstances of the case may require, and also make such order as to costs as the Court may think fit.

Rule 5. Jury. 28 & 29 Vict. c. 99, s. 7.

5. Where the Court shall order any question of fact, or any question as to the amount of damages, to be tried by a jury, the Court shall adjourn the hearing, and appoint a day for the trial of such question by a jury; and thereupon the practice shall be in all respects the same as that under the County Court Acts and rules now in force, in cases where either party has required a jury, including the power to direct a new trial when necessary.

Rule 6. Record for trial.

6. Where the Court shall order any question of fact, or any question as to the amount of damages, to be tried by a jury, the judge shall reduce the question into writing, and the same shall be called the "Record for Trial" (*a*).

(*a*) See forms of record for trial, pp. xxv., xxvi., *ante*.

C. C. Ord. V. Decretal Orders.

ORDER V.

DECRETAL ORDERS.

Rule 1. Registrar to draw order.

1. Where the Court makes any decretal order the registrar shall, as soon thereafter as conveniently may be, draw up, seal, and file such order (*a*).

(*a*) See for decretal orders, forms 20—25, pp. cxxxvii.—cxlii., *post*; and for heading and indorsement, &c., see forms 41, 42, p. cliv., *post*.

County Court Orders, 1865.

C. C. Ord. V.

Rule 2. Preparation of a deed.

2. Where a decretal order directs any deed to be prepared and executed, it shall state by what party the said deed shall be prepared, and to whom it shall be submitted for approval (*b*).

(*b*) Compare as to settlement of deeds under a decree, note (*y*), p. 158, *ante*.

Rule 3. Receiver.

3. Where upon the hearing it appears to the Court expedient that a receiver be appointed, such appointment shall be made by the decretal order, whether the same be asked as part of the relief in the plaint or not (*c*).

(*c*) See as to receivers, p. 499, *ante*.

Rule 4. Sale of real property.

4. Where real property is ordered to be sold, the decretal order shall direct who shall have the conduct of the sale, and by whom the conditions and contracts of sale, and the abstract of title, shall be prepared. And where any conditions or contracts are ordered to be settled by a conveyancing counsel it shall name the counsel to whom they are to be submitted (*d*).

(*d*) As to sales under a decree, see Ord. XXXV. 13, and note (*q*), p. 548, *ante*; and as to the conveyancing counsel, see 15 & 16 Vict. c. 80, s. 40, and notes, p. 158, *ante*.

Rule 5. Sale of personal property.

5. Where a decretal order directs any personal property to be sold, the same shall be sold, under the superintendence of the high bailiff, by public auction, unless the Court shall otherwise order.

Rule 6. Accounts or inquiries.

6. Where any decretal order directs any accounts or inquiries to be taken or made, or any acts to be done, by the registrar, high bailiff, receiver, or parties, it shall name a day within which all such acts shall be done, and accounts and inquiries completed, and shall also name a day, not less than fourteen days after that day, on which the registrar shall certify the result of the accounts and inquiries, and what has been done under such decretal order, and on which the cause will be further heard, and if practicable a final decree made (*e*).

(*e*) As to the certificate and hearing on further consideration, see ss. 32 and 34 of 15 & 16 Vict. c. 80, and notes (*p*), p. 153, and (*t*), p. 155, *ante*.

ORDER VI.

C. C. Ord. VI. Execution of Orders.

EXECUTION OF DECRETAL ORDERS.

Rule 1. Deed how settled.

1. Where a deed is ordered to be prepared, and the parties cannot agree upon the form thereof, the judge may, upon the application of either party, settle the same himself, or name a conveyancing counsel by whom the same shall be settled, subject to the final approval of the judge (*a*).

(*a*) See note (*a*) to last order.

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C. C. Ord. VI.

Rule 2. In taking accounts, &c., registrar to be chief clerk. 15 & 16 Vict. c. 80, ss. 30, 31.

2. Where a decretal order directs that any account be taken or inquiry made, such account shall be taken and inquiry made by the registrar, and he shall for that purpose have all the powers and discharge all the duties of a chief clerk of the Master of the Rolls or a Vice-Chancellor in the Court of Chancery; and all parties prosecuting any such accounts or inquiries shall have the same power of summoning witnesses, including as witnesses any parties in the cause, and of examining them on such accounts or inquiries, and of compelling the production of documents, as they had on the original hearing; and all rules as to the summoning, swearing, and examining of witnesses, and the production of documents at the hearing, shall be applicable (as far as may be) to such summoning, swearing, examining, and production on taking any such accounts, or prosecuting any such inquiries (*b*).

(*b*) See notes, pp. 151, 152, *ante;* and as to time and place of taking accounts, &c. under this rule, see C. C. Ord. XX. 5, p. cxvi., *post.*

Rule 3. In taking accounts, account books to be primâ facie evidence of the matters therein contained.

3. Where a decretal order directs accounts to be taken, any books of account in which the accounts required to be taken, or any of them, have been kept, shall, unless the judge shall otherwise direct, be taken as *primâ facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised (*c*).

(*c*) Compare 15 & 16 Vict. c. 86, s. 54, and notes, pp. 218, 219, *ante.*

Rule 4. Advertisement for creditors, &c.

4. Every advertisement for creditors or other persons having any claim upon or interest in the distribution of any assets to be administered by the Court, which shall be issued pursuant to any decretal order, shall direct every such creditor or other person, by a time, to be thereby limited, to send to the registrar his name and address, and the full particulars of his claim or interest and a statement of his account, and the nature of the security (if any) held by him, and at the time of directing such advertisement a time shall be fixed for adjudicating on the claims (*d*).

(*d*) Compare Ord. XXXV. 37, *et seq.*, p. 556, and Ord. 27 May, 1865, r. 1, p. 637, *ante.*

Rule 5. Creditors need not attend without notice.

5. No such creditor or other person need make any affidavit, or attend in support of his claim, unless he is served with a notice requiring him to do so, as hereinafter provided (*e*).

(*e*) Compare Ord. 27 May, 1865, r. 2, p. 638, *ante;* and see form of notice to creditor to prove his claim, p. cxliv., *post*, form 29.

Rule 6. Securities, deeds, and documents to be produced to registrar.

6. Every creditor shall produce or transmit to the registrar any security held by him, at such time as shall be specified in the advertisement for that purpose, being the time appointed for adjudicating on the claims; and every creditor shall, if required, by notice in writing to be given by the registrar, produce or transmit to the registrar all other deeds and documents necessary to

substantiate his claim before the registrar at his office at such time as shall be specified in such notice.

Rule 7. Pedigree or proof to be produced to registrar.

7. Every person claiming as heir-at-law, devisee, next of kin, or legatee, shall, if required, by notice in writing to be given by the registrar, produce or transmit to the registrar any pedigree or proof mentioned in such notice within such time as shall be therein specified.

Rule 8. Costs when not allowed.

8. In case any creditor or other person shall neglect or refuse to comply with the two last preceding rules, he shall not be allowed any costs of proving his claim unless the registrar shall otherwise direct.

Rule 9. Proof of debts or claims.

9. At the time appointed for adjudication upon the debts or claims, the registrar shall take the evidence of the executor, administrator, or other accounting party upon such debts and claims, and may thereupon, in his discretion, allow any of such debts or claims without further proof, and may direct such investigation of all or any of the debts or claims not allowed, and require such further particulars, information, or evidence relating thereto as he may think fit, and may, if he so think fit, require any creditor or other person to attend and prove his claim, or any part thereof; and the adjudication on such claims as are not then allowed shall be adjourned to a time to be then fixed (*f*).

(*f*) Compare Ord. XXXV. 40—44, p. 557—8; and Ord. 27 May, 1865, r. 7, p. 639, *ante*.

Rule 10. Notice of allowance.

10. Notice of allowance shall be given by the registrar to every creditor or other person whose claim, or any part thereof, has been allowed, and notice shall also be given by him to every such creditor or other person as he shall think fit, to attend and prove his claim or such part thereof as is not allowed, by a time to be named in such notice, not being less than seven days after such notice, and to attend at a time to be therein named, being the time to which the adjudication thereon shall have been adjourned; and in case any such creditor or other person shall not comply with such notice, his claim, or such part thereof as aforesaid, shall be disallowed (*g*).

Rule 11. Claims not before made.

11. Any such creditor or other person who has not before sent in the particulars of his claim pursuant to the advertisement, may do so two days previous to any day to which the adjudication is adjourned.

Rule 12. Claims too late.

12. If any claim be sent in after the time fixed by the advertisement (except as before provided in case of an adjournment), the registrar may, upon special application, entertain the same, upon such terms and conditions as to costs and otherwise, as he thinks fit (*g*).

(*g*) See Ord. XXXV. 43, and note (*p*), p. 547, *ante*; and see form of notice of allowance of claims, p. cxliv. *post*, form 30.

Rule 13. Allowances.

13. In taking any account directed by any decretal order, all just allowances shall be made without any directions for that purpose in such order.

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C. C. Ord. VI.

Rule 14. Application to judge for further directions mero motu.

14. When the registrar, high bailiff, receiver, or any party has by any decretal order been directed to do any act for doing which it may be found necessary to have further directions or an order of the Court, the registrar shall apply to the judge for such direction or order, and upon such application the judge may give such direction or make such order as he may think fit, or may appoint a time to hear all parties upon the application so made by the registrar ; and if the judge shall make such appointment for hearing, the same shall operate as a stay of proceedings in the suit until the day so appointed, if he shall so direct (*h*).

(*h*) See forms of order under this rule, p. cxxxix., *post*, forms 21, 22.

C. C. Ord. VII. Absent Parties.

ORDER VII.

ABSENT PARTIES.

Rule 1. Inquiry as to parties.

1. Where any matter is referred to the registrar by a decretal order, he shall, as soon as conveniently may be, ascertain if there are any parties who, if the decretal order had been made in a suit pending in the Court of chancery, ought, under the 42nd section of the 15 & 16 Vict. c. 86, to be served with a notice under rule 8 of such section (*a*).

(*a*) See pp. 195—9, *ante*.

Rule 2. Notice to parties.

2. Where it shall be necessary to serve any parties with the notice mentioned in the foregoing rule, the same shall be prepared by the registrar, and issued by him to the bailiff, who shall serve the same, and upon such notice the party served therewith may attend the proceedings under the decretal order (*b*).

Rule 3. Application to vary or add to decretal order.

3. Any party who shall be served with a notice under the last foregoing rule, may apply to the Court at the next sitting, or by leave of the judge at any subsequent sitting, to vary or add to the decretal order (*b*).

(*b*) See form 28, p. cxliv., *post*.

C. C. Ord. VIII. Certificate.

ORDER VIII.

REGISTRAR'S CERTIFICATE.

Rule 1. Registrar's certificate.

1. Where a registrar has been ordered to certify to the Court upon any matter he shall present to the Court a certificate in writing signed by him (*a*).

(*a*) See note (*p*), p. 153, *supra ;* and for form of certificate, see form 31, p. cxlv., *post*.

Rule 2. Registrar's certificate to lie in office.

2. The registrar shall prepare his certificate seven days before the day appointed for presenting the same, and shall give notice to all parties to the suite that the same lies in his office for the

inspection of any parties interested therein or affected thereby (*b*); and he shall deliver a copy thereof to any person requiring the same, upon payment of the costs of such copy. County Court Orders, 1865. C. C. Ord. VIII.

(*b*) See form 32, p. cxlviii., *post*.

3. Where any party interested in, or affected by, the registrar's certificate desires to have the same varied, he shall apply by himself, his counsel or attorney, at the court on the day appointed for presenting the same, and the judge shall thereupon hear and determine such application, and shall confirm or vary the certificate, and make such further order thereupon as he may think fit (*c*). Rule 3. Variation of registrar's certificate.

4. If no application shall be made to vary the certificate, it shall be taken as confirmed, unless the judge shall otherwise order (*c*). Rule 4. Confirmation of certificate.

(*c*) See as to varying the certificate, notes on pp. 154, 155, *ante*.

ORDER IX.

C. C. Ord. IX. Final Decree.

FINAL DECREE.

1. When the Court has determined all the questions raised between the parties the registrar shall, as soon thereafter as conveniently may be, draw up a final decree in accordance with the judgment of the Court, and seal and file the same (*a*). Rule 1.

(*a*) See forms 26, 27, p. cxliii., *post*, and for heading of and endorsement on decrees, see forms 41, 42, p. cliv., *post*.

ORDER X.

C. C. Ord. X. Revivor.

REVIVOR AND SUPPLEMENT.

1. Upon any suit becoming abated by death, marriage, or otherwise, or defective in consequence of any change or transmission of interest or liability, the judge shall, on application of any person having a right so to apply, make an order reviving the said suit, or such supplementary decree or order as may have become necessary in consequence of any such matters as aforesaid (*a*). Rule 1. Order under 15 & 16 Vict. c. 86, s. 52.

(*a*) See notes, pp. 211—216, *ante*; and see form of order of revivor, p. clii., *post*, form 38.

2. An order under the foregoing rule shall be drawn up by the registrar and sealed with the seal of the Court, and issued to the bailiff, who shall serve the same upon such person or persons as the Court shall direct. Rule 2. Order to be served.

3. After service of such order, the suit shall, as between the party by whom the order has been obtained and the party on whom it has been served, be in the same plight and condition as it Rule 3. Person served to be bound thereby and

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C. C. Ord. X.

was in before it had become abated or defective as aforesaid; provided that the person so served may move the Court at the next sitting, or by leave of the judge at any subsequent sitting, to discharge such order, and such motion shall be made upon affidavit of the facts relied upon to support the same.

may appeal. 15 & 16 Vict. c. 86, s. 52.

C. C. Ord. XI. Petitions by Trustees, &c.

ORDER XI.

PROCEEDINGS UNDER THE 5TH, 6TH, & 8TH CLAUSES OF THE FIRST SECTION.

Rule 1. Petition.

1. All proceedings under the 5th and 6th clauses of the first section of the Act shall be by petition, and such petition need not show title except so far as is provided by the rules in this order (*a*).

(*a*) See note (*e*), p. lxxxix., *ante*.

Rule 2. Petitions by trustees.

2. Where a trustee petitions under the said fifth clause for an order in any matter relating to the trust, he shall file his petition at the office of the registrar, and leave thereat as many copies thereof as there are persons beneficially interested in the due execution of the trust, and he shall state in such petition his own name, address, and description, and also the names, addresses, and descriptions of the persons beneficially interested, so far as he is able, and the nature of the trust, and how created, the property or money to which the same relates, and the substance of the order which he seeks to obtain (*b*).

(*b*) See forms 8, 9, p. cxxviii., cxxix., *post*.

Rule 3. Petitions by guardian or trustee of infant or next friend.

3. Where any guardian or trustee of any infant petitions for an order relating to the *maintenance or advancement* of such infant, he shall file his petition at the office of the registrar, and where any person, as next friend of an infant, petitions on behalf of such infant for an order upon or against the guardian or trustee of such infant, he shall file his petition at the office of the registrar, and leave thereat as many copies thereof as there are guardians or trustees. And in such petition shall be stated the names, addresses, and descriptions of the petitioner, and of all the persons to whom such order is intended to relate, and shall also state the nature of the guardianship or trust, and how created, of the property to which the trust relates, and the substance of the order which the petitioner seeks to obtain (*c*).

(*c*) See form 10, p. cxxx., *post*.

Rule 4. Application for injunction.

4. Where any person intends to apply under the 8th clause of the first section of the Act, for an order in the nature of an injunction (except as is provided in Order XII. for urgent cases) he shall deliver at the office of the registrar a notice of his intention to apply for the same, together with as many copies thereof as there

are persons upon or against whom such order is intended to be obtained, and he shall state in such notice his own name, address, and description, and, so far as he can, the names, addresses, and descriptions of all such persons, and also the substance of the order which the petitioner seeks to obtain (*b*).

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(*b*) See note (*f*), p. lxxxix., *ante*; for form of notice, see form 12, p. cxxxii., *post*.

Rule 5. Time of filing petitions and giving notices.

5. Under this order petitions shall be filed and notices shall be delivered at the office of the registrar seven days before the sitting of the Court at which the petition is to be heard or application made.

Rule 6. Registrar to issue notices.

6. The registrar, upon receiving any such petition or notice and the copies thereof, shall issue the copies under the seal of the Court to the bailiff for service upon the respective persons to whom they are addressed, together with a notice, signed by himself and under the seal of the Court, informing them of the day and hour on which the petition or application will be heard, and that if they do not attend, either in person or by their attorneys, such order will be made and proceedings taken as the judge may think just and expedient.

Rule 7. Service of petitions and notices.

7. The bailiff of the court shall, four days at least before the hearing, serve all copies of such petitions and notices.

Rule 8. Facts may be supported by affidavit.

8. Upon the hearing of any petition or application under this order, unless the judge shall otherwise direct, the facts relied upon in support of or in opposition to such petition or application shall be proved by affidavit (*c*).

(*c*). As to time for filing affidavits to be used on petitions, see note (*d*), p. 464, *ante*.

Rule 9. Registrar to draw up order.

9. Where the judge makes an order upon such petition or application, the registrar shall, as soon thereafter as conveniently may be, draw up, seal, and file such order.

Rule 10. Orders as to suits to extend to proceedings.

10. The preceding orders relating to suits shall, in all cases where they are applicable, be construed as extending to proceedings under this order.

ORDER XII.

C. C. Ord. XII. Motions, &c.

EX PARTE APPLICATIONS.

Rule 1. Peremptory motions.

1. Wherever in any suit or proceedings it shall become necessary to secure the possession of any property, or to obtain security from any person for any monies in his possession, or to enforce the deposit or the payment into court thereof pending litigation, or the immediate sale of any goods or chattels, and the deposit or payment into court of the purchase-money thereof, or to obtain an order in the nature of an injunction, any party may apply *ex parte* to the judge, either in or out of court, upon affidavits setting forth the facts rendering such order immediately necessary, and upon

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such application the judge may either make an order absolute in the first instance, or make an order to be absolute at any time to be ordered by him unless cause be shown to the contrary, or may make such other order or give such directions in the matter as the judge may think fit, and may order immediate execution (*a*).

Ex parte motions.

(*a*) As to *ex parte* injunctions, see note p. 505, *ante*, and generally as to *ex parte* motions, see note (*a*), p. 529, *ante*.

For forms of order under this rule, see p. cxxxix., *post*, forms 21, 22.

Rule 2. Orders how drawn.

2. The draft of all orders under the foregoing rule shall be prepared beforehand by the registrar of the court in which such suit or proceeding is pending, and shall be presented by the party when he makes such application to the judge to settle and sign.

Rule 3. Orders how drawn and executed.

3. The draft so signed shall be transmitted by the applicant to the registrar of the court in which the suit or proceeding is pending, who shall draw up the order in conformity therewith, and seal and file the same, and issue a copy thereof under the seal of the court to the bailiff for service, and execution shall be issued thereon, as by the order is directed.

C.C. Ord. XIII. Amendments.

ORDER XIII.

AMENDMENTS.

Rule 1. Amendments. 15 & 16 Vict. c. 86, ss. 49 and 53.

1. The judge may, at or during the hearing, and before a final decree or order be made in any suit or proceeding under the Act, exercise all powers of amendment mentioned in the 57th section of the statute 19 & 20 Vict. c. 108, so far as the same may be applicable to suits and proceedings in equity, and also all the powers and authorities of a judge of the High Court of Chancery; and "The County Court Rules, 1857," which are numbered respectively 91, 92, 93, 94, 95, 96, 97, 98, 99, and 100, shall apply, so far as they are applicable, to all suits and proceedings under this Act (*a*).

Amendments at hearing.

(*a*) As to amendments in chancery, see note (*p*), pp. 216, 217, *ante*; and as to amendments on account of misjoinder, notes (*y*) and (*z*), pp. 207, 208, *ante*; and the county court rules, 1857, 91—100, referred to in the text.

C. C. Ord. XIV. Affidavits.

ORDER XIV.

AFFIDAVITS (*a*).

Rule 1. Affidavits to be expressed in the first person.

1. All affidavits shall be expressed in the first person of the deponent.

(*a*) As to the form of affidavits, and the manner of swearing them, and the irregularities which, under special circumstances, are allowed in them, see notes (*a*) and (*b*), pp. 463, 464, *ante*; and as to the registrar's duty on rejecting affidavit, see C. C. Ord. XX. 3, p. cxvi., *post*.

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2. All affidavits shall state the deponent's age, occupation, quality, and place of residence, and also what facts or circumstances deposed to are within deponent's own knowledge, and his means of knowledge, and what facts or circumstances deposed to are known to, or believed by him by reason of information derived from other sources than his own knowledge, and what such sources are.

C. C. Ord. XIV.

Rule 2. Sources of knowledge to be stated.

3. The costs of affidavits not in conformity with the last two preceding rules shall be disallowed on taxation, unless the Court shall otherwise direct.

Rule 3. Costs of affidavits when disallowed.

4. Before any affidavit is used it shall be filed in the office of the registrar (*b*).

Rule 4. Filing of affidavits.

(*b*) As to time for filing affidavits, see note (*d*), p. 464, *ante*.

Rule 5. Erasure, blotting, interlineation, &c., in affidavits.

5. No affidavit in which there is any knife erasure, or which is blotted so as to obliterate any word, or which is illegibly written, or so altered as to cause it to be illegible, nor any affidavit in which there is any interlineation, unless the person before whom the same is sworn shall have duly authenticated such interlineation with his initials in such manner as to show that such interlineation was made before it was sworn, shall be filed or used in any suit or proceeding (*c*).

(*c*) See note (*a*), *supra*.

ORDER XV.

C. C. Ord. XV. Rehearing.

REHEARING.

Rule 1. Rehearing to be allowed on special grounds only.

1. No decree or order once made shall be reheard unless in any case in which the judge, on special grounds, shall think such rehearing necessary, and then only on such terms as the judge may think just (*a*).

(*a*) Compare note (*b*), p. 521, *ante*.

ORDER XVI.

C. C. Ord. XVI. Enforcement.

ENFORCEMENT OF DECREES AND ORDERS (*a*).

Rule 1. Service of decree or order.

1. On the application of the party entitled to the benefit of the decree or order, the registrar shall issue to the bailiff a copy of such decree or order under the seal of the court with a notice to the party to be bound endorsed thereon, and the bailiff shall forthwith serve the same upon the party to whom such notice is addressed.

(*a*) See notes to Ord. XXIX., *ante*, pp. 513—8.

Rule 2.

2. No process shall issue to enforce any decree or order, unless

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by leave of the judge, until three days after a copy thereof under the seal of the court shall have been served upon the party to be bound thereby.

When execution may issue.

Rule 3. Warrant of fi. fa.

3. Where any decree or order is made for the payment of money into court or by one party to another, the registrar shall, after the expiration of the time, if any, appointed by the decree or order for the payment thereof, and after the expiration of the time limited by this order, upon application by the person having the conduct of the suit, or by the payee, issue to the bailiff of the court a writ of fieri facias, as a warrant of execution, as provided by section 94 of 9 & 10 Vict. c. 95 (*b*).

(*b*) See form 34, p. cxlix., *post*.

Rule 4. Warrant of possession or assistance.

4. Where by decree or order made in any suit or proceeding for the delivery up to any person of lands or tenements, goods or chattels, either as owner thereof, or to be sold, or to be held in possession until an order is made as to the disposition thereof, the registrar shall, upon the application of the person entitled to such possession, issue to the bailiff either a warrant of possession, or warrant of assistance, as the case may require (*c*).

(*c*) See forms 35 and 36, p. cl., cli., *post*.

C.C.Ord.XVII. Funds in Court.

ORDER XVII.

FUNDS IN COURT (*a*).

Rule 1. Registrar to obey in the receipt and payment of monies under this Act the treasury instructions.

1. All monies ordered to be paid into court shall be received by the registrar, and the duties of the registrar and the treasurer with respect to such monies shall be in all respects the same as if the monies received under the Act had been received under the authority of the County Court Acts now in force, and all instructions issued or to be issued by the lords commissioners of Her Majesty's treasury, shall apply to monies received under the Act unless therein otherwise directed.

(*a*) Under the new County Court Act of 1867, 30 & 31 Vict. c. 142, s. 96, p. xcvi., *ante*, all monies paid into court under the Act of 1865, are to be invested in post-office savings banks, as directed by rule 5, *infra*, with regard to sums under 30*l*.

Rule 2. Payment into court.

2. Where money is directed to be paid into court, the party directed shall attend and pay the same into the office of the registrar (*b*), and obtain a receipt for the amount ; and in case of stock, shares, or other securities, a transfer shall be made into the names of the registrar and treasurer of the court less the broker's account and charges, and the certificate of transfer, together with such accounts, shall be filed in the office of the registrar, who, with the treasurer, shall hold such monies, stocks, shares, or securities in trust to attend the order of the Court.

(*b*) See now note (*a*), *supra*.

3. Where any party to a suit or proceeding is desirous of having any fund in court in which he is interested, or any part thereof, invested, the Court may at any time order the investment thereof; and such funds may be invested in the purchase of three per cent. consolidated annuities, in the names of the treasurer and registrar of the court for the time being, with or without the name of the person (if any) found or declared by the Court to be immediately entitled to the interest of the fund, and the Court may further order that the person (if any) so entitled shall from time to time receive the dividends thereof.

Rule 3. Investment of monies under order of Court.

4. Where the investment is in the names of the treasurer and registrar alone, the registrar shall from time to time receive the dividends of all the funds so standing in their names, and shall re-invest the dividend in the same names, except where and so far as the Court shall otherwise direct, and shall apportion the amount so re-invested in his books to the right accounts.

Rule 4. Interest on investments.

5. Where the sum to be invested in any case in the same interest does not exceed 30*l.* in one year, the same may, if the judge think fit, be deposited in the post-office savings bank in the name of the registrar for the time being in trust for the parties interested therein, and in such case the person (if any) entitled to the interest on such sum shall be allowed to receive the annual addition made to the same by way of interest, on such certificate or authority from the registrar as the Postmaster-general may from time to time require.

Rule 5. Where sum less than 30*l.* it may be invested in post-office savings banks.

6. Where any order has been made upon any person to pay to the Accountant-general in Chancery any sum of money under section 5 of the Act (*c*), such order shall be drawn up by the registrar and issued to the bailiff of the court; by whom the same shall be served personally upon the person ordered to make the payment.

Rule 6. Service of order under s. 5 of the Act.

(*c*) This section relates to the Legacy Duties Act, see note (*b*), p. 65, *ante*; for form of order to pay legacy into court, see p. cliii., *post*, form 39.

7. Where default shall be made in the production of the certificate of the Accountant-general the registrar shall give notice in writing to the judge of the fact of such default, and the judge may thereupon direct a warrant of execution to issue in accordance with section 5 of the Act.

Rule 7. Where default made in payment to Accountant-general of the Court of Chancery.

8. Where any married woman is interested in any principal money, stocks, shares, or securities exceeding in value 200*l.* or 10*l.* in annual payments, she shall be examined by the judge apart from her husband to ascertain whether the same shall be paid to him or made the subject-matter of a settlement, but if she be under age the Court shall order a proper settlement to be made (*d*).

Rule 8. Married women.

(*d*) Compare note (*b*), p. 366, *ante*.

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C. C. Ord. XVIII. Transfer to Chancery.

ORDER XVIII.

TRANSFER OF PROCEEDINGS TO COURT OF CHANCERY.

Rule 1. Transfer to Court of Chancery where subject matter exceeds the amount to which jurisdiction is given by Act.

1. If during the progress of any inquiry under order of the Court it shall be made to appear that the subject-matter of the suit or proceeding exceeds the amount to which the jurisdiction of the Court is limited, the registrar may proceed with the particular account or inquiry which is then before him, unless he thinks it inexpedient so to do, but he shall at the next sitting of the court present a certificate of the state of the suit and proceedings, and if the judge shall be of opinion that such excess exists, he shall make an order for the transfer of the suit or matter to the Court of Chancery ; and the registrar shall make and file with the record a copy of such certificate and order, and shall transmit the original, together with the order of the judge thereupon, under the seal of the court, by post or otherwise, to the office of the clerk of records and writs in Chancery, or to such other office or officer as the Lord Chancellor may by general order direct, and shall also send notice, by post or otherwise, of the fact, to all parties and persons entitled to be served with a copy of the decree (*a*).

(*a*) See sect. 9 of the Act, p. xci., *ante*, and see form 40, p. cliii., *post*.

C. C. Ord. XIX. Appeal.

ORDER XIX.

APPEAL.

Rule 1. Appeal to be by case. 13 & 14 Vict. c. 61, ss. 14, 15 and 16, and ss. 18 and 19 of the Act.

1. Where any party desires to appeal under section 18 of the Act against the determination or direction of a judge of a county court, such appeal shall be had in accordance with the provisions of section 15 of 13 & 14 Vict. c. 61, upon a case to be stated for the opinion of the Vice-Chancellor appointed in that behalf by the Lord Chancellor (*a*).

(*a*) See *Slattery* v. *Axton*, 14 W. R. 510, as to the necessity of stating a case for appeal.

Rule 2. Notice of appeal.

2. The notice of appeal shall be in writing, and shall be signed by the appellant, his counsel or attorney, and such notice shall be sent, together with the statement of the grounds, by post or otherwise, to the registrar as well as to the successful party.

Rule 3. Proceedings not to be stayed unless vice-chancellor or judge otherwise order.

3. The pendency of an appeal shall not operate as a stay of proceedings, but the vice-chancellor to whom such appeal is made, or the judge from whose decree or order the appeal is made, may stay the proceedings pending the appeal, on such terms as to giving security or otherwise as to such vice-chancellor or judge may seem fit (*b*).

(*b*) See as to staying proceedings pending an appeal, note (*d*), p. 522, *ante*.

4. The appellant shall prepare the case for appeal, and all cases on appeal shall, unless the judge shall otherwise order, be presented to him for signature at the court held next after the parties shall have agreed upon the same; and if the judge approves thereof it shall be signed by him, and sealed with the seal of the court; but where the judge does not approve of the case submitted to him, both parties shall be summoned to attend him where and when the judge shall appoint, and at the place and time so appointed both parties shall be heard as to the form of the case, and the judge shall finally settle and sign the same, and it shall then be sealed by the registrar.

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Rule 4. Case to be signed by judge.

5. Where the parties do not agree upon the form of the case to be stated, the appellant shall lodge with the registrar the draft case prepared by him, and the registrar shall give notice to the parties that the same has been so lodged, and will, on a day to be named in the notice, be presented to the judge for his signature, and on such day the parties may appear before the judge, who shall determine the form of the case, and finally settle and sign the same, and it shall then be sealed by the registrar.

Rule 5. When parties do not agree on case, judge to settle same.

6. When the case shall be so signed and sealed, a copy thereof shall be deposited with the registrar, and another sent by post or otherwise by the appellant to the successful party within three clear days next after the time of signing and sealing the same, and if the appellant do not comply with this rule the successful party may proceed upon the decree or order unless the judge shall otherwise direct.

Rule 6. Copy of case deposited with registrar.

7. The appellant shall, within three clear days next after the case has been signed and sealed, transmit the same with a copy thereof under the seal of the court, by post or otherwise, to the office of the clerks of records and writs in Chancery, or to such other office or officer in the court as the Lord Chancellor may by general order direct, and shall give notice, by post or otherwise, to the successful party that he has done so; in default whereof the successful party may proceed on the decree or order, and shall, on the application to the Court, be entitled to such costs as he shall have incurred in consequence of the appellant's proceedings; provided that, instead of proceeding on such decree or order, the respondent, if he think fit, may, within twenty-eight days from the signing and sealing of the case, transmit it in the manner prescribed, and give the like notice to the appellant of such transmission.

Rule 7. Case to be transmitted.

8. If, after the case has been transmitted, the appellant do not prosecute his appeal, the Court of Appeal may dismiss the same for want of prosecution, and thereupon the decree or order appealed from may be prosecuted and enforced as if there had been no such appeal, and the respondent in the appeal shall be entitled to all costs he may have incurred by reason of the appeal to be recovered as costs in the court below.

Rule 8. If appeal not prosecuted, successful party to proceed.

9. When the court of appeal shall have made a decree or order either party may deposit the same, or an office copy thereof, with

Rule 9. Entering judgment on appeal.

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Rule 10. Appeal to Lancashire Court of Chancery.

the registrar of the county court, and upon being so deposited such decree or order shall be filed and may be enforced as if it had been made by the county court.

10. All the rules in this order shall apply to appeals under section 19 of the Act to the Court of Chancery of the County Palatine of Lancaster, and the Vice-Chancellor thereof, except that the case when signed and sealed shall be transmitted to the registrar of that court.

C. C. Ord. XX. Registrar.

ORDER XX.

DUTIES OF REGISTRAR.

Rule 1. Registrar to enter proceedings.

1. The registrar shall keep a book, to be called "The Suits and Proceedings in Equity Book," and shall enter and number in such book each suit or proceeding consecutively in the order in which they are entered, and shall also enter therein a note of all documents filed and steps taken in such suit or proceeding (*a*).

(*a*) For mode of entry, see forms A., B., C., pp. clv.—clix., *post.*

Rule 2. Documents to be distinguished.

2. Upon the filing of any document it shall be distinguished by the number of the plaint or petition in respect of which it is filed being endorsed thereon, and it shall be further distinguished from other documents filed in the suit or proceeding by placing after the number a distinctive letter of the alphabet.

Rule 3. Duty of registrar when he rejects affidavits, or where documents are imperfect.

3. Where a registrar rejects an affidavit under Order XIV. he shall give notice, by post or otherwise, to the party offering the same for filing, of and the reasons for such rejection ; and where any other document is so imperfect upon the face thereof, or by reason of having blanks therein, that it cannot be easily read or understood, the registrar may refuse to file, and may return the same by post, or otherwise, to the party offering the same, to be re-written, or the blanks filled up (*b*).

(*b*) See p. cxi., *ante.*

Rule 4. Summons, &c., to be sealed.

4. Before any summons, notice, or other document, or any copy thereof, shall be issued by the registrar, the same shall be sealed with the seal of the court.

Rule 5. Registrar to appoint time and place for inquiries and taking accounts.

5. Where the registrar is required by any decretal order to make inquiries or to take accounts (*c*), he shall appoint some day, being not less than twenty-one days from the date of such order, to sit in his office or at the court to hear and determine all matters relating to such inquiry and accounts, and he shall forthwith prepare and insert advertisements in conformity with such order, stating the time, place, and purpose of such sitting, and shall insert the same fourteen days previous to such sitting.

(*c*) See C. C. Ord. VI. 2, p. civ., *ante.*

6. Upon the day so appointed the registrar shall sit at the time and place appointed, and shall hear all parties interested, their counsel or attorneys. County Court Orders, 1865. C. C. Ord. XX. Rule 6. Hearing before registrar.

7. Where a registrar is not prepared to certify to the Court on the day mentioned in the order he shall apply to the judge for an extension of time, and state the reason for making the application, and he shall give notice, by post or otherwise, to the parties of the enlargement of the time, and of the day on which he is to certify. Rule 7. Further time for certificate.

8. Whenever a notice for appeal is given, the registrar shall detain the proceeds of any execution which may then be in or may come into his hands pending such appeal, to abide the event of such appeal, unless the judge shall otherwise order. Rule 8. Registrar to retain money to abide result of appeal.

ORDER XXI.

C. C. Ord. XXI. High Bailiff.

DUTIES OF HIGH BAILIFF.

1. Where any personal property is directed to be sold by auction, the high bailiff shall superintend the sale; and where the property is to be sold by private contract, he shall carry out the directions of the Court in respect of such sale. Rule 1. As to sale of personal property.

2. The high bailiff shall serve all documents issued to him by the registrar for service, and execute all warrants. Rule 2. Services and executions.

3. Where a warrant shall direct the high bailiff to take possession of, without selling or delivering to a party, any goods or chattels, he shall make, or cause to be made an inventory or appraisement of the goods or chattels which he may take into his possession, and may, upon receiving as a deposit the amount of such appraisement or sufficient security, to be approved by the registrar, for the safe custody, and for the delivery up of possession upon request, of such goods and chattels, relinquish the possession thereof on condition that the same shall be re-delivered to him or held to abide the order of the Court. Rule 3. Possession.

4. All moneys coming into the hands of the high bailiff shall be paid over by him to the registrar to the credit of the suit or proceeding in which the same was so received by him within twenty-four hours after he shall have received the same. Rule 4. Payment over of money.

ORDER XXII.

C. C. Ord. XXII. Receiver.

DUTIES OF RECEIVER (*a*).

1. Every receiver appointed by the Court, other than the high bailiff, shall give such security by bond to the registrar for the Rule 1. Receiver to give security.

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faithful discharge of his duties, and the payment over of money, as the Court shall direct.

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(*a*) As to receivers, see note (*a*) p. 499, *ante*, and see form 33, p. cxlviii., *post*.

Rule 2. His accounts to be audited by registrar, and when.

2. The receiver shall submit to the registrar, and the registrar shall audit, the accounts of the receiver, which need not be in any particular form, as soon as conveniently may be after the receipt or realisation of the assets, and immediately after such audit shall pay over to the registrar the balance found thereby to be in his hands.

Rule 3. To produce voucher, and if required verify on oath.

3. The registrar may require any receiver to produce any receipt, accounts, and vouchers necessary for verifying the accounts, and may disallow any item not proved to his satisfaction, and may, if he shall think fit, require any receiver to verify such accounts and vouchers upon oath.

Rule 4. To produce account for audit upon notice.

4. The receiver shall, at any time before the complete realisation of the assets, produce his accounts to be audited in manner provided by this order, upon receiving seven days' notice in writing from the registrar so to do, and such notice may be sent by post or otherwise to the address of the receiver.

Rule 5. Audit once a year.

5. Where the duties of the receiver are continuous, no longer period than one year shall in any case be allowed to intervene between each audit.

Rule 6. Parties need not attend audit.

6. In no case shall it be necessary for any party to attend at the audit of the receiver's account, but where a party is dissatisfied with a receiver's account he may apply to the Court or registrar for a revision of the registrar's allowances.

Rule 7. Court may order income to be paid direct to parties.

7. The Court may order the receiver to pay over, at such time or from time to time as it shall see fit, to the party entitled to the beneficial interest therein, or to the guardian of any infant, any yearly or other accruing rents or interest instead of paying the same into court, and to take credit for such payments in his accounts when audited.

C. C. Ord. XXIII. Practice.

ORDER XXIII.

PRACTICE.

Rule 1. Proceedings may be wholly or partly printed.

1. All plaints, petitions, statements, and documents whatsoever in any suits or matter under the Act which are required to be filed shall be on foolscap paper, and may be wholly or partly printed or written, and dates and sums occurring therein may be expressed in figures.

Rule 2. Documents to be sealed.

2. All judicial or official documents in any suit or proceeding, and all copies thereof respectively issued by the Court, shall be stamped by the registrar with the seal of the court.

Rule 3. Service.

3. Every document, the mode of serving which is not specially defined by these orders, may be served, and the service thereof

may be proved, in conformity with the practice that has heretofore prevailed in the county courts as to the service of summonses, excepting so far as the same relates to the time of service. County Court Orders, 1865.

4. Where any party to a suit or proceeding changes his attorney he shall give notice in writing of such change to the registrar, stating the name or firm and place of business of the new attorney, and the registrar shall file the notice (*a*). C. C. Ord. XXIII. Rule 4. Change of attorney.

(*a*) See form 37, p. clii., *post.*

5. No suit or motion for a decree or decretal order shall be heard until the same shall be set down for hearing. Rule 5. Setting down for hearing.

6. The times of the sitting of a county court in matters of equity shall be those appointed for the transaction of the general business of the court, unless the judge shall otherwise order and shall appoint a special day or days for a sitting of the Court in matters of equity. Rule 6. Days for equity sittings.

7. Where any party to any suit or proceeding is unacquainted with the Christian name of any person whose name he desires to insert in any plaint, proceeding, or document, he may describe such person by his surname, or by his surname and the initial of his Christian name, or by such name as he is generally known by. Rule 7. Where Christian name unknown.

8. Where any proceedings or documents are filed an extra copy, in addition to the copies to be delivered under these orders, shall be left with the registrar for the use of the judge. Rule 8. Copy for use of judge.

9. The registrar shall transmit by post, prepaid, to the judge, five days before the sitting of the Court, all copies of proceedings and documents left for his use under these orders. Rule 9. To be forwarded to judge.

10. Copies of all proceedings or documents shall be prepared by the registrar for any person requiring the same, upon payment of the costs of such copies when the order for the same is given. Rule 10. Registrar to prepare all copies.

11. Where by these orders any act is to be, or may be, done by any party to a suit or proceeding, such act may be done either in person or by his attorney. Rule 11. Acts may be done by counsel or attorney.

12. Where a party acts by attorney, service of any proceeding or document upon such attorney, or delivery of the same at his office, or sending the same to him by post, shall be good service upon the party for whom such attorney acts, as upon the day when the same is so served or delivered, or upon which in the ordinary course of post it would be delivered, except in cases where by these orders personal service upon a party is required (*b*). Rule 12. Service on attorney, when sufficient.

(*b*) Compare Ord. III. 7, and notes, pp. 388—9, *ante.*

13. Any proceeding or document may, by leave of the registrar, be served by the attorney of the party requiring to effect such service ; but the costs of such service, and proof thereof, shall not be allowed, except by order of the judge. Rule 13. Service by the attorney.

14. Where by reason of the absence of any party, or from any other sufficient cause, the service of any summons, notice, proceeding, or document cannot be made, or ought in the opinion of the Rule 14. Substituted service.

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judge to be *dispensed with*, the judge may wholly dispense with such service, or may, at his discretion, order any substituted service or notice by advertisement or otherwise in lieu of such service (*c*).

(*c*) See note (*g*), p. xcviii., *ante*.

By advertisement.

Rule 15. In what newspapers. Costs to be prepaid.

15. The judge shall order in what newspaper any advertisement which may from time to time be ordered in any suit or proceeding shall be inserted; and when there is no fund in court, the expense of such advertisements shall be paid to the registrar by the party requiring the same before they are inserted.

Rule 16. Advertisements in "London Gazette."

16. All advertisements to be inserted in the "London Gazette" shall be transmitted to the registrar of county court judgments in London, who shall cause them to be classified and inserted in lists under the direction of the commissioners of Her Majesty's treasury.

Rule 17. Conduct of suit.

17. The judge may order what party shall have the conduct of any suit or proceeding (*d*), or any part thereof, and may rescind or alter such order, or make new orders in that behalf, from time to time as he shall think fit.

(*d*) See note (*f*), p. 147, *ante*, as to conduct of causes.

Rule 18. Court may enlarge or abridge periods mentioned in these orders.

18. The judge may, if he think fit, enlarge or abridge any of the times fixed by these orders for taking any step, or filing any document, or giving any notice, in any suit or proceeding.

Rule 19. Undertaking by next friend to pay costs.

19. Before the name of any person shall be used in any suit or proceeding as next friend of any infant, married woman, or other party, such person shall sign an undertaking, in the form given in the schedule, to be responsible for any costs to which the plaintiff or applicant may become liable in the course of the suit or proceeding, and such undertaking shall be annexed by the registrar to the plaint or petition (*e*).

(*e*) See note (*t*), p. 166, *ante;* and see form 1, p. cxxii. *post.* Where the undertaking has not been signed or annexed, the proper course is not to dismiss the plaint, but to order it to stand over until such undertaking has been signed and annexed (*Williams* v. *Williams*, 2 W. N. 203.)

Rule 20. Transfer of suits or proceedings from one court to another in certain cases.

20. Where suits or proceedings shall be commenced in different courts by parties in the same interest such suits or proceedings shall be transferred to the court in which the first plaint or petition was filed, and shall there be proceeded with in the same way in all respects as if they had been commenced in that court. (*f*).

(*f*) See note (*b*), p. 394, *ante*.

Rule 21. Taxing officer.

21. The registrar shall be the taxing officer of the court (*g*).

(*g*) As to power of taxing masters, see note (*b*), p. 576, *ante*.

Rule 22. Interest on debts.

22. Creditors are to be entitled to interest in respect of debts as to such of them as carry interest after the rate they respectively

carry, and as to all others after the rate of £4 per cent. per annum, from the date of the decretal order, and to costs of successfully proving such debts according to the scale of costs in that behalf (*h*). County Court Orders, 1865. C. C. Ord. XXIII.

23. Interest is to be computed on legacies after the rate of £4 per cent. per annum, from the end of one year from the date of the testator's death, unless otherwise ordered or a different rate is directed by the will (*h*). Rule 23. Interest on legacies.

(*h*) As to interest on debts and legacies, see Ord. XLII. 9, and note (*i*), p. 612, *ante*.

24. A note of every decretal order or final decree made in any suit, or of an order made on a petition, shall be transmitted to the registrar of county court judgments in London, who shall register the same under the direction of the commissioners of Her Majesty's treasury. Rule 24. Decrees to be registered. Sect. 15.

25. All proceedings and documents may be in forms similar to the forms in the schedule to these orders where the same are applicable; and in cases where no forms are provided, parties shall frame the proceedings or documents, using as guides those contained in the schedule. Rule 25. Forms.

26. The rules and forms and practice heretofore in force in the county courts shall, subject to these orders, be adopted with reference to suits and proceedings in equity, so far as they shall be respectively applicable. Rule 26. General practice rule.

ORDER XXIV.

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INTERPRETATION.

Interpretation.

1. In these orders the following words shall have the several meanings hereby assigned to them, over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction; (viz.) Rule 1. Interpretation of

(1.) The words "the Act" shall mean 28 & 29 Vict. c. 99: the Act,

(2.) Words importing the masculine gender shall include females: Masculine.

(3.) Words importing the singular number shall include the plural, and *vice versâ*: Singular.

(4.) The word "party" shall mean a party to a suit or proceeding; and "person" shall mean any person, whether a party to the suit or proceeding or not; and the words "person" or "party" shall include a body politic or corporate: Person.

(5.) The word "affidavit" shall include statutable affirmations and attestations upon honour, and the word "sworn" shall include affirmed according to the statute and attested upon honour: Affidavit.

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Day.
Court.
Bailiff.

(6.) Where any number of days is mentioned, it shall mean "clear days":

(7.) The word "court" shall mean the county court having jurisdiction in the suit or proceeding, and the words "judge" and "registrar" shall respectively mean the judge and registrar of that court.

(8.) The words "high bailiff" shall include any assistant bailiff lawfully appointed by the high bailiff, and the word "bailiff" shall include high bailiff.

J. B. Dasent. Rupert A. Kettle.
D. D. Heath. William Furner.
J. Worlledge.

I approve of these orders and forms to come into force in all County Courts on the 1st day of October, 1865.

CRANWORTH, C.

County Court Forms, 1.

SCHEDULE OF FORMS

TO THE COUNTY COURT ORDERS IN EQUITY FOR REGULATING THE PRACTICE OF THE COUNTY COURTS.

1.

1. Undertaking as to costs.

UNDERTAKING BY NEXT FRIEND OF INFANT TO BE RESPONSIBLE FOR DEFENDANT'S COSTS (*a*).

In the County Court of holden at

I, the undersigned , being the next friend of A. B., who is an infant, and who is desirous of entering a plaint [*or* of taking proceedings] in this court against C. D. of, &c., hereby undertake to be responsible for the costs of the said C. D. of, &c., in the cause, and that if the said A. B. fail to pay to the said C. D., when and in such manner as the Court shall order, all such costs of such cause as the Court shall direct him to pay to the said C. D., I will forthwith pay the same.

Dated this day of

(Signed)

(*a*) See C. C. Ord. XXIII. 19, p. cxx., *ante*.

2.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR SUBSTITUTED SERVICE (*b*).

In the County Court of holden
at
In the suit of A. B. *v.* C. D.

I, J. S. of [*address and description*], make oath and say as follows :—

State facts showing that defendant has been within the jurisdiction of the County Courts at some time not more than two years before the plaint was filed, and that he is beyond the seas. Or, that upon inquiry at his usual place of abode (if he had any), or at any other place or places where prior to the time when the plaint was filed he might probably have been met with, he could not be found so as to be served, and that in either case there is just ground to believe that he has gone out of the realm or otherwise absconded to avoid being served, and that service on J. N. will be effective to reach C. D.

Then state deponent's means of knowledge of the facts deposed to.

Sworn, &c.

(*b*) See note (*g*), p. xcviii., *ante*.

3.

ORDER FOR SUBSTITUTED SERVICE (*c*).

In the County Court of holden
at
In the suit of A. B. *v.* C. D.

It appearing to me, upon the affidavit of that it is desirable for the purposes of this suit that service of the plaint be made upon at , and that such service be deemed good service on the defendant C. D., I do order that service of the plaint and summons in this suit be deemed good service upon the said defendant C. D.

Dated this day of

J. S., Judge.

(*c*) See note (*b*), *supra*.

County Court Form, 4.

4. Plaint. Administration by Creditor.

4.

ADMINISTRATION.—[Clause 1, of Sect. 1.]

By Creditor.

Plaint in Equity.

In the County Court of holden at

A. B. of, &c. [*address and description*], Plaintiff,

and

C. D. of, &c. [*address and description*], Defendant.

A. B., the above-named plaintiff, states as follows :—

1. E. F., late of , was at the time of his death, and his estate still is, indebted to the plaintiff in the sum of [*here insert nature of debt and security, if any*].

2. The said E. F. duly made his last will, dated the day of , and thereof apppointed C. D. executor [*or* devised his estate in trust, &c., *or* died intestate, *as the case may be*].

3. The said will was duly proved by the said C. D. [*or* letters of administration were granted, &c.]

4. The defendant has possessed himself of the personal [and real *or* the proceeds of the real] estate of the said E. F., and has not paid the plaintiff his said debt.

5. The said E. F. died on or about the day of , and had his last place of abode within the jurisdiction of this court. [*Omit this if C. D. has his place of abode within the jurisdiction of this court.*]

6. The whole of the personal [and real] estate of the said E F. does not exceed in amount [*or* value] the sum of 500*l.*

7. The plaintiff prays that an account may be taken of the personal [and real] estate of the said E. F., deceased, and that the same may be duly administered under the decree of the Court, and for such further or other relief as the Court may think fit.

This plaint was filed by , of , attorney for the plaintiff, *or* by of .

By Legatees (Specific).

Omit paragraph 1, and commence paragraph 2, E. F., late of , duly made his last will, dated the day of , and thereof appointed C. D. executor, "and by such will bequeathed to the plaintiff [*here state the specific legacy*]."

For paragraph 4 substitute—

The defendant is in possession of the personal estate of the said E. F., and *inter alia*, of the said [*here name the subject of the specific bequest*].

For the commencement of paragraph 7, substitute—

The plaintiff prays that the defendant may be ordered to deliver to him the said [*here name the subject of the specific bequest*] or that, &c.

County Court Forms, 4, 5.

Plaint.

By Legatees (Pecuniary).

Omit paragraph 1, and substitute for paragraph 2, E. F., late of duly made his last will, dated the day of , and thereof appointed C. D. executor, and by such will bequeathed to the plaintiff a legacy of £ .

In paragraph 4, substitute "legacy" for "debt."

By Legatees (Residuary).

Omit paragraph 1, and substitute for paragraph 2, E. F., late of duly made his last will, dated the day of , and thereof appointed C. D. executor, and by such will bequeathed to the plaintiff the residue [*or* a part of the residue] of his personal [*or* and the proceeds of his real] estate.

In paragraph 4, substitute "the residue [*or* share of residue] so bequeathed" for "said debt."

Next of Kin.

For paragraphs 1, 2, 3, and 4, substitute—

1. E. F., late of , was at the time of his death possessed and entitled of personal estate.

2. He died on or about the day of , intestate.

3. Letters of administration were duly granted to the defendant, and that he has possessed himself of the personal estate of the deceased [*leave out* "letters of administration were duly granted to the defendant, and that" *if none have been granted*].

4. That the plaintiff is next of kin [*or* one of the next of kin] of the said E. F.

5.

EXECUTION OF TRUSTS.

5. Plaint. Execution of trusts.

[Clause 2 of Section 1.]

Plaint in Equity.

In the County Court of holden at .

A. B. of, &c, [*address and description*] . . . Plaintiff,

and

C. D. of, &c. [*address and description*], the *or* one of the *cestui que trusts* (*see Rule* 6 *of* 15 & 16 *Vict. cap.* 86, *sect.* 42) . . . . . Defendant.

County Court Forms 5, 6.

Plaint.

A. B., the above-named plaintiff, states as follows :—

1. He is one of the trustees under a deed of settlement bearing date on or about the day of made upon the marriage of the said E. F. and G. H., the father and mother of the defendant [*or* a deed of assignment of the estate and effects of E. F. for the benefit of C. D. the defendant, and other the creditors of E. F.]

2. The said A. B. has taken upon himself the burden of the said trust, and is seized of [*or* in possession of *or* of the proceeds of] the lands, tenements, and hereditaments [goods and chattels], conveyed [*or* assigned] by the before-mentioned deed.

3. The trust estate [*or* fund] does not exceed in amount [*or* value] the sum of 500*l.*

4. The said C. D. claims to be entitled to a beneficial interest under the before-mentioned deed.

5. The plaintiff is desirous to account for all the rents and profits of the said lands, tenements, and hereditaments [and the proceeds of the sale of the said *or* part of the said lands, tenements, and hereditaments, *or* goods and chattels, *or* the proceeds of the sale of *or* part of the said goods and chattels, *or* the profits accruing to the plaintiff as such trustee in the execution of the said trust]; and he prays that the Court will take the accounts of the said trust, and also that the whole of the said trust estate may be administered in the Court for the benefit of the said C. D. the defendant, and all other persons who may be interested in such administration, in the presence of the said C. D., and such other persons so interested as the Court may direct, or that the said C. D. may show good cause to the contrary.

This plaint was filed by of attorney for the plaintiff, *or* by

[*N.B.*—*Where the suit is by a* cestui que trust *the plaint may be modelled,* mutatis mutandis, *on the plaint by a legatee.*]

6.

6. Plaint. Foreclosure.

FORECLOSURE.

[Clause 3 of Section 1.]

Plaint in Equity.

In the County Court of holden at

A. B. of, &c. [*address and description*] . . . Plaintiff,

and

C. D. of, &c. [*address and description*] . . . Defendant.

A. B., the above-named plaintiff, states as follows :—

1. By an indenture of mortgage bearing date on or about the

day of 18 , a freehold [copyhold *or* leasehold] cottage, with the garden and appurtenances, situated within the jurisdiction of this court, were conveyed [*or* assigned] by the defendant to him the plaintiff, his heirs [*or* executors, administrators], and assigns, for securing the principal sum of £ together with interest thereon after the rate of 5*l.* per centum per annum, subject to redemption upon payment by the said defendant of the said principal and interest at a day long since past. County Court Forms 6, 7. Plaint.

2. There is now due from the defendant to the plaintiff the sum of £ for principal and interest on the said mortgage.

3. The plaintiff prays that the Court will order the defendant to pay him the said sum of £ with such further interest as may accrue between the filing of the plaint and the day of payment, and also the costs of this suit, on some day to be named by the Court, and in default that the equity of redemption of the said mortgaged premises may be foreclosed, or that the said premises may be sold, and the proceeds applied in and towards the payment of the said principal, interest, and costs; and he prays that for that purpose all proper directions may be given and account taken by the Court.

This plaint was filed by of , attorney for the plaintiff, *or* by

REDEMPTION.

Transpose parties and also the facts in paragraph 1.

For paragraph 2 substitute—

2. There is now due from the plaintiff to the defendant, for principal and interest on the said mortgage, the sum of £ , which the plaintiff is ready and willing to pay to the defendant, of which the defendant before filing this plaint had notice.

For paragraph 3 substitute—

3. The defendant prays that he may redeem the said premises, and that the defendant may be ordered to reconvey [*or* reassign] the same to him upon payment of the said sum of £ and interest, with such costs as the Court may order (if any), upon a day to be named by the Court, and that the Court will give all proper directions for the preparation and execution of such reconveyance [*or* assignment], and doing such other acts as may be necessary to put him into possession of the said premises, freed from the said mortgage.

7.

SPECIFIC PERFORMANCE.

[Clause 4 of Section 1.]

7. Plaint. Specific performance.

Plaint in Equity.

In the County Court of holden at

County Court Forms, 7 8.

Plaint.

A. B. of, &c. [*address and description*] . . . Plaintiff,
and
C. D. of, &c. [*address and description*] . . . Defendant.

A. B., the above-named plaintiff, states as follows :—

1. By an agreement dated the day of and signed by the above-named defendant, C. D., he the said C. D. contracted to buy of [*or* sell to] him certain freehold property, therein described and referred to, for the sum of £ .

2. He has applied to the said C. D. specifically to perform the said agreement on his part, but that he has not done so.

3. The said A. B. has been and still is ready and willing specifically to perform the agreement on his part, of which the said C. D. has had notice.

4. The plaintiff prays that the Court will order the said A. B. specifically to perform the said agreement, and to do all acts necessary to put the said A. B. in full possession of the said property [*or* to accept a conveyance and possession of the said property], and to pay the costs of the suit.

This plaint was filed by of attorney for the plaintiff, *or* by

[*N.B.—In suit for delivery up to be cancelled of any agreement, omit paragraphs 2 and 3, and substitute a paragraph stating generally the grounds for requiring the agreement to be delivered up to be cancelled, such as that the plaintiff signed it by mistake, under distress, or by the fraud of the defendant, and alter the prayer according to the relief sought.*]

8.

8. Petition. Trustee Relief Act.

UNDER TRUSTEE RELIEF ACT.

[Clause 5 of Section 1.]

Proceeding in Equity.

In the County Court of holden at

In the matter of

The petition of A. B. of, &c. [*address and description*],

Showeth,

1. That by a deed of settlement bearing date the day of made upon the marriage of C. D. with E. F. certain freehold property in the settlement mentioned was conveyed to [*or* that C. D. deceased, by his will bearing date the day of and proved on the day of by your petitioner and G. H. in the Prerogative Court of the Archbishop of Canterbury, certain freehold property in the will mentioned was devised to] the petitioner, together with G. H.,

upon certain trusts, *inter alia* [*here set out the clause or portion of the trust deed or will upon which the order of the Court is required*]. County Court Forms, 8 9. Petition.

2. That the said G. H. died on or about the day of leaving the petitioner surviving trustee.

3. That disputes and doubts have arisen under the clause before set out, as to whether [*here set out the specific question upon which the opinion, advice, or direction of the Court is required*].

4. That the trust estate [*or* fund] to which this proceeding relates does not exceed in value the sum of 500*l.*

5. That the persons interested in this application are I. J. of, &c. [*address and description*], K. L. of, &c.

6. Your petitioner prays the Court to declare its opinion, advice, or direction whether [*here state specific question which the Court is asked to determine*] (*d*).

This petition was filed by of , attorney for the plaintiff, *or* by

[*N.B.—By stat.* 23 *&* 24 *Vict. c.* 38. *s.* 9, *this must be signed by counsel.*]

(*d*) See as to the questions which will be decided under this Act, note (*o*), p. 70, *ante*.

9.

UNDER TRUSTEE ACTS.

9. Petition. Trustee Act.

Proceeding in Equity.

In the County Court of holden at

In the matter of

The petition of A. B. of, &c. [*address and description*],

Showeth,

1. That C. D. deceased, by his will bearing date the day of and proved on the day of by your petitioner and G. H. in the Prerogative Court of the Archbishop of Canterbury, certain freehold property in the will mentioned was devised to [*or* that by a deed of settlement bearing date the day of made upon the marriage of C. D. with E. F. certain freehold property in the settlement mentioned was conveyed to] the petitioner, together with G. H. upon certain trusts.

2. That the said G. H. died on or about the day of leaving the petitioner surviving trustee.

3. That the said trusts are still unexecuted, and that the petitioner is unable by reason of having left the neighbourhood [*or* his bodily infirmity, *or any cause for relinquishing trust*] *further to execute the said trusts;* that it is for the advantage of the parties

County Court Forms, 9, 10.

beneficially interested in the due execution of the trust that new trustees be appointed by the Court in the place of the petitioner.

4. That and of, &c. [*address and description*] are proper persons to appoint as such trustees.

5. That I. J. of, &c. [*address and description*], and L. M. of, &c. [*address and description*], are the persons beneficially interested in the said trust.

6. Your petitioner prays that the said and or some other persons to be named by the Court, be appointed trustees in his place and stead, and that the cost of the proceeding be ordered to be paid out of the trust fund, and to give such directions as may be necessary for executing such order.

This petition was filed by of attorney for the plaintiff, *or* by

---

10.

10. Petition. Maintenance.

MAINTENANCE AND ADVANCEMENT OF INFANTS.

[Clause 6 of Section 1.]

Proceeding in Equity.

In the County Court of holden at

In the matter of

The petition of A.B. of, &c. [*address and description*],

Showeth,

1. That he is guardian [*or* trustee] of C. D., an infant, and that by the will of F. F. a sum of £ was bequeathed to the petitioner, upon trust to apply the income thereof to the maintenance and education of the said C. D. during his minority, and to pay the said principal sum of £ to the said C. D. upon his attaining the age of twenty-one years.

2. That the said C. D. is now of the age of fourteen years or thereabouts, and is now resident within the jurisdiction of this court, and the petitioner has heretofore spent the whole of the accruing interest upon his maintenance and education.

3. That in the opinion of your petitioner it would be greatly to the interest and advancement of the said C. D. if a sum of £ , part of the said principal money of £ , was now expended by the petitioner in payment to G. H. of , saddler, as a premium to the said G. H. to take and receive the said C. D. as his indoor apprentice.

4. The petitioner prays that he may direct him to use and appropriate the said sum of £ part of the said principal trust money or sum of £ for the apprenticeship of the said infant accordingly.

This petition was filed by of attorney for the plaintiff, *or* by .

County Court Forms 10, 11. Petition.

11.

PARTNERSHIP.

[Clause 7 of Section 1.]

11. Plaint. Partnership.

Plaint in Equity.

In the County Court of holden at

A. B. of, &c. [*address and description,*] . . . . Plaintiff,

and

C. D. of, &c. [*address and description,*] . . . . Defendant.

A. B. the above-named plaintiff states as follows:

1. He and the said C. D. the defendant have been for the space of years [*or* months] last past carrying on business together at within the jurisdiction of this court, under certain articles of partnership in writing, signed by them respectively, [*or* under a certain deed sealed and executed by them respectively, *or* under a verbal agreement between them, the said plaintiff and defendant].

2. Divers disputes and differences have arisen between the plaintiff and defendant as such partners, whereby it has become impossible to carry on the said business in partnership with advantage to the partners.

3. The whole of the property, stock, and credits of such partnership do not exceed in value the sum of 500*l.*

4. The plaintiff desires to have the said partnership dissolved, and he is ready and willing to bear his share of the debts and obligations of the partnership according to the terms of the said articles [deed, *or* agreement.]

5. The plaintiff prays the court to decree a dissolution of the said partnership, and that the accounts of the said partnership trading may be taken by the court, and the assets thereof realised, and that each party may be ordered to pay into court any balance due from him upon such partnership account, and that the debts and liabilities of the said partnership may be paid and discharged, and that the costs of the suit may be paid out of the partnership assets, and that any balance remaining of such assets, after such payment and discharge, and the payment of the said costs, may be divided between the plaintiff and defendant, according to the terms of the said articles [deed *or* agreement], or that if the said

County Court Forms 11, 12.

Plaint.

assets shall prove insufficient, he the plaintiff and the said defendant may be ordered to contribute in such proportions as shall be just to a fund to be raised for the payment of and discharge of such debts, liabilities, and costs. And to give such other relief as the court shall think fit.

This plaint was filed by of attorney for the plaintiff, *or* by .

[*N.B. In suits for winding up of any partnership omit the prayer for dissolution; but instead thereof insert a paragraph stating the fact of the partnership having been dissolved.*]

12.

12. Injunction.

NOTICE OF APPLICATION FOR ORDER IN THE NATURE OF INJUNCTION (*e*).

[Clause 8 of Section 1.]

Proceeding in Equity.

In the County Court of holden at

In the suit of A. B. *v.* C. D.

Take notice that I, A. B., intend to apply at the sitting of the court at aforesaid on the day of [*or* to Mr. Judge at his sittings at *or* at on the day of *as the case may be*] for an order in the nature of an injunction to restrain C. D. from further prosecuting an action which he has commenced against me in the Exchequer of Pleas to recover damages for the breach of the contract for the specific performance of which this suit was commenced [*or* to restrain him from receiving and giving discharges for any of the debts due to the partnership in the matter of the partnership between us for the winding up of which the suit was commenced, *or* from digging the turf from the land which was agreed to be sold by him to me by the agreement the specific performance of which this suit is commenced to enforce, *or as the case may be.*]

Dated this day of 186 .

A. B.

To C. D.

[*N.B.—Where the order in the nature of an injunction is to be applied for against a party whose name and address does not appear upon any proceeding already filed in the suit, it must be stated in full to enable the high bailiff to serve the notice.*]

(*e*) See C. C. Ord. XI. 4, p. cvi., *ante*.

County Court Form 13.

13. Summons on Plaint.

13.

SUMMONS ON PLAINT.

No. of plaint in Equity.

In the County Court of holden at

(*Seal.*)

A. B. [*address, description*] . . . . Plaintiff.

and

C. D. [*address, description*] . . . . Defendant.

You are hereby summoned to appear at a County Court, to be holden at on the day of at the hour of in the noon, to show cause why the relief prayed for in the plaint hereunto annexed should not be granted.

Dated this day of 186 .

, Registrar.

To C. D. defendant [*or one of the defendants*].

N.B.—If you do not attend either in person or by your attorney at the time and place above mentioned, such decree or order will be made, and proceedings taken as the judge may think just and expedient.

[*Endorsement on Summons.*]

If you desire to lessen the amount of costs which you may be put to, you should follow such of these directions as may apply.

If you desire to admit the truth of the allegations in the plaint, and to submit to the judgment of the court, you may, at any time before the return day of the original summons, appear before the registrar, and in his presence sign an admission of the truth of the plaint and a consent to abide by and perform any decree or order the court may make.

If you desire to disclaim any interest in the subject matter of the suit, or if you intend at the hearing to deny any of the statements in the plaint, or raise any question of law upon such statement without admitting the truth thereof, you may deliver to the registrar, within eight days after the service of the summons upon you, a statement signed by you to that effect.

If you intend to rely on a set-off, infancy, coverture, a statute of limitation, or a discharge under a Bankrupt or an Insolvent Act, as a defence, you must give notice of such special defence to the registrar five clear days before the day of hearing, and such notice must contain the particulars required by "The County Court Rules, 1857;" and you must deliver to the registrar as many copies of such notice as there are plaintiffs, and an additional copy for the use of the Court. If your defence be a set-off, you must, with each notice thereof, deliver to the registrar a statement of the particulars thereof.

Summonses for witnesses and for the production of documents will

County Court Forms 13, 14. Summons.

be issued upon application at the office of the registrar of the court upon payment of the proper fee.

14.

14. Notice to admit documents.

NOTICE TO ADMIT AND INSPECT (*f*).

In the County Court of holden at

In the suit of A. B. *v.* C. D.

Take notice that the plaintiff [*or* defendant, *or* petitioner] proposes to adduce in evidence on the trial in this cause [*or* matter] the several documents hereunder specified, and that the same may be inspected by the defendant [*or* plaintiff, *or* petitioner], his attorney or agent at on , between the hours of ; and the defendant [*or* plaintiff, *or* petitioner] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed as they purport respectively to have been; that such as are specified as copies are true copies; and that such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence on such trial.

Dated the day of .

G. H., attorney for .

To E. F., attorney for .

ORIGINALS.

Description of the Documents.	Date.

COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered, when, how, and by whom.

(*f*) See C. C. Ord. III. 2, p. xcviii., *ante*.

15.

APPLICATION FOR SUMMONS TO PRODUCE.

15. Summons to produce documents.

In the County Court of holden
at

In the suit of A. B. *v.* C. D.

To the registrar of the above court.

I, A. B. [*or* C. D.] hereby apply for a summons to issue, calling upon of to attend the court upon the day of , and then and there to produce the following documents.

A. B. [*or* C. D.]

ORIGINALS.

Description of Documents.	Date.

COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered, when, how, and by whom.

16.

SUMMONS TO WITNESS (*g*).

16. Summons to witness.

No. of plaint in Equity.

In the County Court of holden
at

In the suit of A. B. *v.* C. D.

You are hereby required to attend at [*court house in*] on the day of 186 , at the hour of in the noon, to give evidence in the above cause on behalf of the [*plaintiff or defendant, as the case may be*], and then and there to have and produce [*the several documents hereunder specified*], and all other books, papers, writings, and other documents relating to the said action, which may be in

County Court Forms 16—18. Summons.

your custody, possession, or power. In default of your attendance you will be liable to a penalty of 10*l.*

Dated this day of 186 .

, Registrar.

To .

[*Here insert list of documents mentioned in the application for the summons.*]

(*g*) See note (*r*), p. 193, *ante*.

17.

17. Defendant's admission.

DEFENDANT'S ADMISSION.

In the County Court of holden at

In the suit of A. B. *v.* C. D.

I, the undersigned defendant, admit the truth of the allegations in the plaint, and hereby submit to the judgment of the Court thereon.

(Signed) C. D., Defendant.

Signed in the presence of

[*This paper marked* (A) *is the paper referred to in the annexed affidavit.*]

18.

18. Defendant's signature to admission.

AFFIDAVIT OF SIGNATURE TO DEFENDANT'S ADMISSION.

No. of plaint in Equity.

In the County Court of holden at

In the suit of A. B. *v.* C. D.

I, of gentleman, an attorney of Her Majesty's court of at Westminster, make oath and say, that I was present on the day of one thousand eight hundred and sixty , and did see the above-named C. D., the defendant, sign the statement hereunto annexed, marked with the letter A, and that the name set to the said statement is in the handwriting of the defendant, and that the name set to the said statement as the witness attesting the same is in my handwriting.

Sworn at in the county of this day of one thousand eight hundred and sixty , before me

19.

DEFENDANT'S STATEMENTS.

19. Defendant's answer.

In the County Court of holden
at

In the suit of A. B. *v.* C. D.

I, the undersigned defendant [*or* one of the defendants], disclaim all interest under the will of the said E. F. in the plaint named [*or* as heir-at-law of, *or* as next of kin, *or* one of the next of kin of E. F. deceased in the said plaint named].

Or, I the undersigned defendant state, that I admit [*or* deny] [*here repeat in the language of the plaint the statements admitted or denied*].

Or, I the undersigned defendant submit that upon the facts stated in the plaint it does not appear that there is any agreement which can be legally enforced [*or* that it appears upon the said plaint that I am jointly liable with one E. F., who is not a party to the suit, and not severally liable as by the plaint appears, *or* that it appears by the said plaint that G. H. should have been a joint plaintiff with the said A. B. in the said suit, *or as the case may be*].

Or that the plaintiff has conveyed [*or* assigned] his interest in the said mortgage [*or* equity of redemption] to one I. J. [*or* that I have conveyed or assigned to H. L. by way of further charge for securing the sum of £ , the equity of redemption in the property sought by the suit to be foreclosed].

Or that since the dissolution of the partnership the plaintiff has executed a deed under seal, whereby the plaintiff covenants to discharge all debts and liabilities of the partnership, and generally to release me from all claims and liabilities either by or to himself and others in respect of the said partnership trading, [*or as the case may be*].

(Signed) C. D., Defendant.

Where filed by attorney add—

This statement was filed by
of
attorney for the defendant.

20.

DECRETAL ORDER.—ADMINISTRATION SUIT.

20. Decretal order.—Administration.

In the County Court of holden
at

In the suit of A. B. *v.* C. D.

or

In the matter of the petition of A. B.

It is ordered that the following accounts and inquiries be taken and made; that is to say,

County Court Form 20.

Decretal Order.

In creditor's suit.

1. That an account be taken of what is due to the plaintiff and all other the creditors of the deceased.

In suits by legatees.

An account to be taken of the legacies given by the testator's will.

In suits by next of kin.

An inquiry be made and account taken of what, or of what share, if any, the plaintiff is entitled to as next of kin [*or* one of the next of kin] of the intestate.

[*After the first paragraph, the decretal order will, where necessary, order, in a creditor's suit, inquiry and accounts for legatees, devisees, heirs-at-law, and next of kin. In suits by claimants other than creditors, after the first paragraph in all cases an order to inquire and take an account of creditors will follow the first paragraph, and such of the others as may be necessary will follow, omitting the first formal words. The form is continued as in a creditor's suit.*]

3. An account of the funeral and testamentary expenses.

4. An account of the personal estate of the deceased come to the hands of the defendant, or to the hands of any other person by his order or for his use.

5. An inquiry what part (if any) of the personal estate of the deceased is outstanding and undisposed of.

6. And it is further ordered, that the defendant do, on or before the day of next, pay into court all sums of money which shall be found to have come to his hands, or to the hands of any person by his order or to his use.

7. And that if the registrar shall find it necessary for carrying out the objects of the suit to sell any part of the personal estate of deceased, that the same be sold accordingly.

8. And that Mr. be receiver in the suit [*or* proceeding], and receive and get in all outstanding debts and outstanding personal estate of the deceased, and pay the same into the hands of the registrar, [and shall give security by bond for the due performance of his duties to the amount of £ .]

9. And it is further ordered, that if the personal estate of the deceased be found insufficient for carrying out the objects of the suit, then the following further inquiries be made, and accounts taken ; that is to say,

10. That an inquiry be made what real estate the deceased was seised of or entitled to at the time of his death.

11. What are the incumbrances (if any) affecting the real estate of the deceased, or any part thereof.

12. An account, so far as possible, of what is due to the several incumbrancers, and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed.

13. And that the real estate of the deceased, or so much thereof as shall be necessary to make up the fund in court sufficient to carry out the object of the suit, be sold, with the approbation of

the judge, free from incumbrances (if any) of such incumbrancers as shall consent to the sale, and subject to the incumbrances of such of them as shall not consent. County Court Forms 20, 21. Decretal Order.

14. And it is ordered, that shall have the conduct of the sale of the real estate, and shall prepare the conditions and contracts of sale, and the abstract of title, subject to the approval of the registrar, and that in case any doubt or difficulty shall arise the papers shall, with the like approval, be submitted to , esquire, to settle.

15. And it is further ordered, that, for the purpose of the inquiries hereinbefore directed, the registrar shall advertise in the newspapers according to the practice of the court, or shall make such inquiries in any other way which shall appear to the registrar to give the most useful publicity to such inquiries.

16. And it is ordered, that the above inquiries and accounts be made and taken, and that all other acts ordered to be done be completed, before the day of and that the registrar do certify the result of the inquiries, and the accounts, and that all other acts ordered are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of

17. And lastly it is ordered, that this suit [*or* matter] stand adjourned for making a final decree to the day of .

[*Such part only of this decretal order is to be used as is applicable to the particular case.*]

21.

FORM OF ORDER UNDER ORDER VI. RULE 14, OR UNDER ORDER XII.

Form 21. Order on interlocutory or *ex parte* application.

In the County Court of , holden at .

In the suit of A. B. *v.* C. D.

It appearing to me that it will be for the benefit of the estate that the remaining outstanding debts be sold, I do order that the debts now due to the estate of E. F. the testator [*or* intestate] in the plaint in this suit mentioned be sold as soon as conveniently may be by [the receiver] by private contract [*or* public auction] for the highest price that can be obtained for the same.

Dated this day of

J. S., Judge.

County Court Forms 22, 23.

22.

22. Order on interlocutory or *ex parte* application.

FORM OF ORDER UNDER ORDER VI. RULE 14, OR UNDER ORDER XII.

In the County Court of , holden at

In the suit of A. B. *v.* C. D.

It appearing to me that it is necessary for carrying out the objects of this suit that the real estate [*or* part of the real estate] of the deceased be sold (*h*), I do order that all that freehold [copyhold *or* leasehold] messuage or tenement, &c. [*setting out parcels as in last conveyance*] being the real [*or* part of the real] estate of E. F. late of in the county of deceased, the testator [*or* intestate] in the plaint in the suit mentioned, be offered for sale by public auction at the Hotel at by Mr. auctioneer, and be then and there sold [provided the sum bid for the same be not less than £ *or*] to the highest bidder without reserve.

Dated this day of

J. S., Judge.

(*h*) See sect. 55 of 15 & 16 Vict. c. 86, and notes p. 220, *ante*.

23.

23. Decretal order for reference.

DECRETAL ORDER FOR REFERENCE IN FORECLOSURE SUIT BY LEGAL MORTGAGEE.

In the County Court of , holden at

In the suit of A. B. *v.* C. D.

It is ordered that it be referred to the registrar to take an account of what is due to the plaintiff for principal and interest on the mortgage mentioned in the plaint (making allowance on one side or the other for any rents or profits received by the plaintiff and for any sums of money lawfully expended by the plaintiff about the mortgaged premises), and to tax the plaintiff's costs of this suit, and that the registrar do certify to the Court on the day of what he shall find to be due for principal and interest as aforesaid, and for costs: And upon the defendant paying into court what shall be certified to be due to the plaintiff for principal and interest as aforesaid, together with the said costs, within six months after the registrar shall have presented his certificate; it is ordered that the plaintiff do re-convey the said mortgaged premises, free and clear from all encumbrances done by him, or any claiming by, from, or under him, and to deliver up to the registrar all deeds and writings in his custody or power relating thereto, and that upon such re-conveyance being made, and deeds

and writings being delivered up, the registrar shall pay out to the plaintiff the said sum so paid in as aforesaid, for principal, interest, and costs; but in default of the defendant paying into court such principal, interest, and costs as aforesaid by the time aforesaid, then it is ordered that the defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said premises, and the registrar is to settle the conveyance if the parties differ about the same; and it is further ordered, that after the expiration of the said six months, the plaintiff shall be at liberty to apply to the Court for a final decree for the foreclosure of the said mortgage. County Court Forms 23, 24. Decretal Order.

[*N.B.*—*Where the state of the account is ascertained at the first hearing, instead of the order of reference to the registrar, begin,* It is declared that the sum of £ is now due to the plaintiff for principal and interest on the mortgage mentioned in the plaint, and it is ordered that the registrar do tax the plaintiff's costs of this suit, and that.]

24.

DECRETAL ORDER FOR SALE IN A SUIT BY A LEGAL OR EQUITABLE MORTGAGEE OR PERSON ENTITLED TO A LIEN (*i*). 24. Decretal order for sale.

In the County Court of , holden at

In the suit of A. B. *v.* C. D.

It is ordered that it be referred to the registrar to take an account of what is due to the plaintiff for principal and interest on the mortgage [*or* equitable mortgage *or* lien] mentioned in the plaint, and to tax the plaintiff's costs of this suit, and that the registrar do certify to the Court on the day of what he shall find to be due for principal and interest as aforesaid, and for costs: And upon the defendant paying into court what shall be certified to be due to the plaintiff for principal and interest as aforesaid, together with the said costs, within six months after the registrar shall have presented his certificate; it is ordered that the plaintiff [do re-convey the said mortgaged premises free and clear from all incumbrances done by him, or any claiming by, from, or under him, and] do deliver up to the registrar all deeds and writings in his custody or power relating thereto, and that upon such re-conveyance being made, and deeds and writings being delivered up, the registrar shall pay out to the plaintiff the said sum so paid in as aforesaid for principal, interest, and costs; but in default of the defendant paying into court such principal, interest, and costs as aforesaid by the time aforesaid, then it is ordered that the said mortgaged premises [*or* the premises subject

County Court Forms 24, 25.

Decretal Order.

to the said equitable mortgage *or* lien] be sold with the approbation of the registrar: And it is ordered that the money to arise by such sale be paid into court, to the end that the same may be duly applied in payment of what shall be found due to the plaintiff for principal, interest, and costs as aforesaid, and that the balance (if any) shall be paid to the defendant.

(*i*) See sect. 48 of 15 & 16 Vict. c. 86, and notes, p. 205, *ante*.

25.

25. Decretal order.—Dissolution of partnership.

DECRETAL ORDER.—DISSOLUTION OF PARTNERSHIP.

In the County Court of , holden at

In the suit of A. B. *v.* C. D.

It is declared that the partnership in the plaint mentioned between the plaintiff and defendant ought to stand dissolved as from the day of and it is ordered that the dissolution thereof as from that day be advertised in the London Gazette, &c.

And it is ordered that be the receiver of the partnership estate and effects in this suit, and do get in all the outstanding book debts and claims of the partnership.

And it is ordered that the following accounts be taken:

1. An account of the credits, property, and effects now belonging to the said partnership.

2. An account of the debts and liabilities of the said partnership.

3. An account of all dealings and transactions between the plaintiff and defendant from the foot of the settled account exhibited in this suit and marked (A,) and not disturbing any subsequent settled accounts.

And it is ordered that the goodwill of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock in trade, be sold on the premises, and that the registrar may, on the application of any of the parties, fix a reserved bidding for all or any of the lots at such sale, and that either of the parties are to be at liberty to bid at the sale.

And it is ordered that the above accounts be taken, and all the other acts required to be done be completed, before the day of and that the registrar do certify the result of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of

And lastly it is ordered that this suit stand adjourned for making a final decree to the day of

26.

FORECLOSURE.—FINAL DECREE.

26. Final Decree. Foreclosure.

In the County Court of , holden at

In the suit of A. B. *v.* C. D.

Whereas it appears to the Court that the defendant has not paid into court the sum which was on the day of last certified by the registrar to be due to the plaintiff for principal and interest upon the mortgage in the plaint mentioned, and for costs, pursuant to the decretal order made in this suit on the day of last, and that the period of six months has elapsed since the said day of

It is ordered that the defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the said mortgaged premises.

27.

PARTNERSHIP.—FINAL DECREE.

27. Final Decree. Partnership.

In the County Court of , holden at

In the suit of A. B. *v.* C. D.

It is ordered that the fund now in court, amounting to the sum of £ , be applied as follows:

1. In payment of the debts due by the partnership set forth in the registrar's certificate, amounting in the whole to £ .

2. In payment of the costs of all parties in this suit, amounting to £ [*These costs must be ascertained before the decree is drawn up.*]

3. In payment of the sum of £ to the plaintiff as his share of the partnership assets, and of the sum of £ being the residue of the said sum of £ now in court, to the defendant as his share of the partnership assets.

[*Or*, and that the remainder of the said sum of £ be paid to the said plaintiff [*or* defendant] in part payment of the sum of £ certified to be due to him in respect of the partnership accounts.

And that the defendant [*or* plaintiff] do, on or before the day of pay to the plaintiff [*or* defendant] the sum of £ being the balance of the said sum of £ due to him which will then remain due].

County Court Forms 28—30.

28.

28. Notice to absent party.

NOTICE OF DECRETAL ORDER TO ABSENT PARTY (*k*).

In the County Court of , holden at

In the suit of A. B. *v.* C. D.

Take notice that on the day of the decree of which a copy is hereunto annexed was made in this cause, and that from the service of this notice you will be bound by the proceedings in the above cause in the same manner as if you had been originally made a party to the suit, and that you may attend the proceedings under the said decretal order, and that you may apply to the Court to add to the decretal order.

, Registrar.

(*k*) See note (*b*), p. 197, *ante*.

29.

29. Notice to creditor to prove claim.

NOTICE TO CREDITOR TO PROVE HIS CLAIM (*l*).

In the County Court of , holden at

In the suit of A. B. *v.* C. D.

You are hereby required to prove the claim sent in by you against the estate of A. B. deceased, by filing such affidavit as you may be advised in support thereof, and by giving notice thereof to me, on or before the day of next, and by attending at my office on the day of , 186 , at o'clock in the noon, being the time appointed for adjudicating on the claim.

Dated this day of 186 .

, Registrar.

(*l*) See C. C. Ord. vi., 5, p. cii., *ante*.

30.

30. Allowance of claim.

NOTICE TO CREDITOR OF ALLOWANCE OF CLAIM.

In the County Court of , holden at

In the suit of A. B. *v.* C. D.

The claim sent in by you against the estate of A. B., deceased, has been allowed at the sum of with interest thereon at per cent. per annum, from the day of 186 , and for costs.

[*If part only allowed, add,* If you claim to have a larger sum allowed, you are hereby required to prove such further claim, by filing such affidavit as you may be advised in support thereof, and by giving notice thereof to me on or before the day of next, and by attending at my office on the day of 186 , at o'clock in the noon.

Dated this day of 186 .

, Registrar.

County Court Forms 30, 31.

Notice to creditor.

31.

REGISTRAR'S CERTIFICATE.

31. Registrar's Certificate.

In the County Court of , holden at

In the suit of A. B. *v.* C. D.

In obedience to the decretal order of this court made in the above suit, I hereby certify that the result of the accounts and inquiries [*or* of the sale and apportionment] which have been taken and made in pursuance of the made in this dated the day of 186 , is as follows :

The plaintiffs and defendants have attended by themselves or by their respective attornies.

Notice of Decretal Order.

Notice of the said decretal order of the day of 186 , has been served upon .

The persons so served include all the now living and the personal representatives of such of them as are dead, except such as are parties to this suit, and except hereinafter named.

Service of notice of the said decretal order upon the said was dispensed with.

Personal Estate Account.

The defendant the executor [*or* administrator] of the testator [*or* intestate] named in the said have received personal estate to the amount of £ , and they have paid or are entitled to be allowed on account thereof sums to the amount of £ , leaving a balance due from [*or* to] them of £ on that account.

References to Account.

The particulars of the above receipts and payments appear in the account marked A., verified by the affidavit of the said defendant , filed the day of , and the account marked B., verified by the affidavit of ,

County Court Form 31.

Certificate.

filed the day of , and which accounts are to be filed with this certificate.

Variations from Accounts.

Except that in addition to the sums appearing in such account to have been received, the said defendant [*or* plaintiff] is [*or* are] charged with the following sums, (that is to say), £ , and except that of the items of disbursement in the said account I have disallowed those numbered , and I have deducted from the item numbered the sum of £ , and from the item numbered the sum of £ , and in addition to the disbursements appearing in such account the said defendant has paid and been allowed the sum of £ .

Special Allowances in Accounts.

The payments allowed to the said defendant [*or* plaintiff] in the said account include the sum of £ paid into court to the credit of this cause, on the day of 186 .

Reference to Transcript of Account.

The before-mentioned account marked A. has been altered, and the account marked A. B., and which is also to be filed with the certificate, is a transcript of the said account marked A. as altered and passed.

No Personal Estate received.

The defendant the executor [*or* administrator] of the testator [*or* intestate] named in the said have not, nor hath any or either of them, or any person or persons by their or any or either of their order, or for their or any or either of their use, received any part of the personal estate of the said testator [*or* intestate].

Funeral Expenses.

The funeral expenses of the testator [*or* intestate], amounting to the sum of £ have been paid and are allowed the defendant [*or* plaintiff] the executor [*or* administrator] of the said testator [*or* intestate] in the said account of personal estate [hereinafter mentioned].

Debts.

The debts of the testator [*or* intestate, including the plaintiff's] which have been allowed are set forth in the schedule hereto, and, with the interest thereon, and costs mentioned in the said schedule, are due to the plaintiff and the other persons therein named, and amount altogether to £ . No other person has been allowed, or come in and proved, any debt against the estate of the said testator [*or* intestate], and the time fixed by advertisement for that purpose has expired.

County Court Form 31.

Certificate.

Such of the said debts as are specialty are set forth in the first part of the said schedule, and amount to £ ; such as are simple contract are set forth in the second part of the said schedule, and amount to £ .

Interest on Debts.

The interest on such debts is computed down to the date of this certificate, and after the rate of £4 per centum per annum, from the day of 186 , the date of the said decretal order, unless otherwise specified in the said schedule.

Legacies and Annuities.

The legacies given by the testator, other than annuities, are set forth in the first part of the schedule hereto, and, with the interest therein mentioned, remain due to the persons therein named, and amount altogether to £ .

The annuities given by the testator, with the arrears due thereon, are set forth in the second part of the said schedule. Such arrears amount to £ .

Interest on Legacies.

The interest on such legacies is computed down to the date of this certificate, and after the rate of £4 per centum per annum, from the day of 186 , the end of one year after the testator's death, unless otherwise specified in the said schedule.

The arrears of the annuities are computed to the date of this certificate, and from the testator's death, unless otherwise specified in the said schedule.

Outstanding Estate.

The personal estate of the said testator [*or* intestate] [not specifically bequeathed] outstanding or undisposed of consists of the particulars set forth in the schedule hereto.

Real Estate.

The real estate which the said testator [*or* intestate] was seised of or entitled to consists of the particulars set forth in the schedule hereto.

Incumbrances on Real Estate.

The incumbrances affecting the said testator's [*or* intestate's] real estate are specified in the schedule hereto.

Rents and Profits Account.

The defendants [*or* plaintiff] the trustee named in the said decretal order have received rents and profits of the testator's real estate to the amount of £ and they have paid or are entitled to be allowed on account thereof sums to the amount of £ leaving a balance due from [*or* to] them of £ on that account.

County Court Forms 31—33.

Certificate.

No Rents and Profits Received.

The defendants [*or* plaintiff] the trustees named in the said decretal order have not, nor hath any or either of them or any person or persons by their or any or either of their order, or for their or any or either of their use, received any sum or sums of money on account of the rents and profits of the testator's [*or* intestate's] real estate.

Next of Kin.

The next of kin, according to the statutes for the distribution of the effects of intestates, of the intestate named in the said living at the time of his death were of whom the said have since died.

The legal personal representative of the said
The legal personal representative of the said
The legal personal representative of the said

Dated this day of .

, Registrar.

32.

32. Certificate. Inspection.

NOTICE THAT REGISTRAR'S CERTIFICATE MAY BE INSPECTED (*l*).

In the County Court of holden at

In the suit of A. B. *v.* C. D.

Take notice that the certificate of the result of the inquiries made and accounts taken by me under the decretal order of this court made on the day of in this cause, lies in my office and can be inspected by you up to and inclusive of the day of [*here insert the day before the cause is to be further heard*].

Dated this day of .

, Registrar.

(*l*) See C. C. Ord. VIII. 2, p. civ., *ante*.

33.

33. Receiver's bond.

BOND TO BE GIVEN BY RECEIVER.

Know all men by these presents, that we, A. B. of, &c., and C. D. of, &c., and E. F. of, &c., are jointly and severally held and firmly bound to G. H., registrar of the County Court of holden at , in £ to be paid to the said G. H., or his certain attorney, executors, administrators, or assigns. For which payment to be made we bind ourselves, and each and every of us, in the whole, our and each of our heirs,

executors, and administrators, jointly and severally, firmly by these presents. County Court Forms 33, 34.

Sealed with our seals, and dated this day of , one thousand eight hundred and . Receiver.

And whereas a plaint in equity has been filed in this court by A. B. against C. D. for the purpose of [*here insert object of suit*].

And whereas the said A. B. has been appointed, by order of the above-mentioned Court, to receive the rents and profits of the real [*or* freehold *or* copyhold *or* leasehold] estate [*or* estates] [and to get in the outstanding personal estate] of C. D., the testator in the said plaint named.

Now the condition of this obligation is such, that if the above bounden A. B. do and shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the real estates, and in respect of the personal estate, of the said C. D. [*or as may be*] at such periods as the said Court shall appoint, and do and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court hath directed or shall hereafter direct, then this obligation shall be void and of none effect, otherwise shall remain in full force and virtue.

A. B. (L. S.)
C. D. (L. S.)

Signed, sealed, and delivered by the above bounden in the presence of

NOTE.—*If deposit of money be made the memorandum thereof should follow the terms of the condition of the bond, and will not require a stamp.*

34.

WARRANT OF EXECUTION ON A DECREE OR ORDER OF THE COURT FOR THE PAYMENT OF MONEY (*m*).

34. Enforcement of decree.

In the County Court of holden at .

In the suit of A. B. *v.* C. D.

Whereas on the day of , 186 this Court did, in the matter of this suit, decree [*or* order] that A. B. [*or* C. D.] should pay to C. D. [*or* A. B.] [*or* should pay into court] the sum of : And whereas a copy of such decree [*or* order] was duly served upon A. B. [*or* C. D., *as the case may be*] : And whereas the said A. B. [*or* C. D.] has not paid the said sum of money according to the said decree [*or* order] : These are therefore, to require and order you forthwith to make and levy by distress and sale of the goods and chattels of the said A. B. [*or* C. D.], wheresoever they may be found within the district of

County Court Forms 34, 35.

Process.

this court (excepting the wearing apparel and bedding of him or his family, and the tools and implements of his trade, if any, to the value of five pounds,) the sum stated at the foot of this warrant, being the amount directed to be paid by the said decree [*or* order], including the costs of this execution, and also to seize and take any money or bank notes (whether of the Bank of England or of any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money, of A. B. [*or* C. D.] which may there be found, or such part or so much thereof as may be sufficient to satisfy this execution, and the costs of making and executing the same, and to pay what you shall have so levied to the registrar of this court, and make return of what you have done under this warrant, immediately upon the execution thereof.

Given under the seal of the court, this day of 186 .

By the Court,

, Registrar.

To the high bailiff of the said court,
and others the bailiffs thereof.

Amount ordered to be paid . . .
Costs . . . . . .
Total amount to be levied .

(*m*) See C. C. Ord. XVI. 3, p. cx., *ante*.

35.

35. Warrant of assistance.

WARRANT OF ASSISTANCE (*n*).

In the county court of holden at

In the suit of A. B. *v.* C. D.

Whereas, according to the tenor and true meaning of a decree [*or* an order] bearing date the day of 186 , made in the matter of this suit, the said defendant C. D. was ordered to deliver up possession to A. B. in the said order named of all that, *&c.* [*as in order*]: And whereas a copy of such decree [*or* order] was duly served upon the said C. D., yet nevertheless the said C. D., and other ill-disposed persons, his accomplices, have refused to pay obedience thereto, and detain and keep the possession of the said house [*or* tenement and premises]: These are, therefore, to authorise and require you to forthwith enter into and upon the said messuage [*or* tenement and premises], and that you do remove, eject, and expel the said C. D., his tenants, servants, and accomplices, each and every of them, out of and from the said messuage [*or* tenement and premises], and every part and parcel thereof, and that you do place and put the said A. B. and his assigns into the full, peaceable, and quiet possession thereof, and defend and keep him and his said assigns in such peaceable

and quiet possession when and as often as any interruption may or shall from time to time be given or offered to them or any of them, according to the true intent and meaning of the said order : and herein you are not in anywise to fail.

Given under the seal of the court this day of 186 .

By the Court.

, Registrar.

To the high bailiff of the said court, and others the bailiffs thereof.

(*n*) See C. C. Ord. XVI. 4, p. cx., *ante*.

36.

WARRANT OF POSSESSION (*o*).

In the County Court of holden at

In the suit of A. B. *v.* C. D.

Whereas on the day of 186 , this Court did in the matter of this suit, decree [*or* order] that you, the high bailiff of this court, should [*or* that A. B. should] take possession of the goods and chattels of E. F. deceased, in the said suit mentioned, and which at the date of the said order were in the possession of the defendant [and sell and convert the same into money, or keep and hold the same to abide the further order of the Court, *as the case may be*].

These are therefore by virtue of the said decree [*or* order] and the statute in such case made and provided to will and require, authorise and empower, you and every one of you to whom this warrant is directed forthwith to enter into and upon the house and houses of the said C. D. and also in all other place or places belonging to the said C. D. where any of the goods or chattels, part of the estate of the said E. F. deceased, are suspected to be ; and there to seize all the goods and chattels whatsoever, belonging to the estate of the said E. F. deceased.

And in case of resistance, or of not having the key or keys of any door, or lock of any premises belonging to the said C. D., where any of the goods or chattels, part of the estate of the said E. F. deceased, are suspected to be, you shall break open or cause the same to be broken open, for the better execution of this warrant.

Given under the seal of the court this day of 186 ,

By the Court.

, Registrar.

To the high bailiff of the said court, and others the bailiffs thereof.

(*o*) See C. C. Ord. XVI. 4, p. cx., *ante*.

County Court Forms 37—39.

37. Change of attorney.

37.

NOTICE OF CHANGE OF ATTORNEY (*p*).

In the County Court of holden at

In the suit of A. B. *v.* C. D.

To the registrar of the court.

Take notice that I, A. B. [*or* C. D.] have hitherto employed as my attorney G. H. of in the above-mentioned cause, but that I have ceased to employ him, and that my present attorney is I. K. of .

A. B. [*or* C. D.]

(*p*) See C. C. Ord. XXIII. 4, p. cxvii., *ante*.

38.

38. Revivor.

ORDER OF REVIVOR (*q*).

In the County Court of holden at

In the suit of A. B. *v.* C. D.

Upon application of [*here state by whom the application is made and the events which have happened rendering it necessary to apply*], I do order that this suit stand revived and be in the same plight and condition as the same was in at the time of the said abatement.

Dated this day of

J. S., Judge.

(*q*) See C. C. Ord. X. 1, p. cv., *ante*.

39.

39. Order under Legacy Duty Act.

ORDER OF PAYMENT OF LEGACY INTO COURT OF CHANCERY.

In the County Court of holden at

In the suit of A. B. *v.* C. D. *Or*, In the matter of .

Whereas it has been found by this Court by its decree of the day of in this suit [*or* matter] that K. L. of is entitled to the sum of , and whereas the said K. L. is an infant [*or* absent beyond seas], and it appearing to the Court that it is desirable that under the power given to it by the fifth section of the Act of Parliament passed in the twenty-eighth and twenty-ninth years of her Majesty's reign, chapter ninety-nine, C. D. the defendant in this suit, [*or* matter, *as the case may be*] should be ordered to pay such sum of money *to the accountant-general of the Court of Chancery* (*r*), in

accordance with the provisions of section thirty-two of an Act passed in the session of parliament held in the thirty-sixth year of the reign of his Majesty King George the Third, chapter fifty-two, it is ordered that the said [ ] do pay the same accordingly, and do within days produce to the registrar of this court the certificate of the said accountant-general of the payment to him of such money.

County Court Forms 39, 40.

Legacy Duty Act.

By the Court.

, Registrar.

(*r*) See now note (*a*), p. cxii., *ante*.

[ENDORSEMENT ON LAST ORDER.]

N.B.—Your attention is drawn to the following provisions of the Act 36 Geo. 3, c. 52, and to the rule of this court.

Any legacy or sum of money to which any person who is an infant or absent beyond seas may be found or declared entitled by any county court in any suit or matter under this Act may be ordered by the Court to be paid to the accountant-general of the Court of Chancery, in accordance with the provisions of section thirty-two of an Act passed in the session of parliament held in the thirty-sixth year of the reign of his Majesty King George the Third, chapter fifty-two (*s*), and the person ordered to pay the same shall, within such time as the Court shall direct, produce to the registrar of the court the certificate of the accountant-general of the payment of such money; and if default be made in such payment the judge may direct a warrant of execution to issue to the high bailiff of the court, who by such warrant shall be empowered to levy or cause to be levied by distress and sale of the goods and chattels of such person a sum of money equal in amount to the sum which he was ordered to pay to the said accountant-general and to the costs incurred by reason of such default, and the sum so levied shall be paid to and be receivable by the said accountant-general under the direction of the Court.

Rule of Court.—Where default shall be made in the production of the certificate of the accountant-general the registrar shall give notice in writing to the judge of the fact of such default, and the judge may thereupon direct a warrant of execution to issue in accordance with section five of the Act.

(*s*) See note (*b*), p. 65, *ante*.

40.

ORDER OF TRANSFER OF SUIT OR MATTER TO COURT OF CHANCERY (*s*).

40. Transfer into Court of Chancery.

In the County Court of holden at

In the suit of A. B. *v.* C. D., [*or* matter of]

Whereas it appearing that the subject-matter of this suit exceeds

County Court Forms 40—43.

Transfer to Chancery.

in amount the sum of 500*l.*, it is ordered that this suit [*or* matter] be transferred to the High Court of Chancery, together with the annexed certificate of the registrar of this court, showing the state of the suit [*or* matter] and the proceedings that have been had therein in this court.

By the Court.

, Registrar.

(*t*) See C. C. Ord. XVIII., p. cxii., *ante*.

41.

41. Heading and indorsement on decree.

GENERAL HEADING FOR AND INDORSEMENT ON DECRETAL ORDER OR DECREE.

In the County Court of holden at on the day of

Upon the hearing this day of Mr. for the plaintiffs and upon the hearing of Mr. for the defendants [*or if some of the defendants do not appear, then* for the defendants C. D., &c.], and no one appearing for the defendants E. and F. ; it is ordered

---

INDORSEMENT.

Take notice that unless you obey the directions contained in this order, obedience thereto will be enforced in such manner as the law provides.

42.

42. Memorandum on decree.

MEM. TO BE PLACED AT FOOT OF EVERY SUMMONS, NOTICE, DECREE, OR ORDER OF COURT, OR ANY OTHER PROCESS OF THE COURT.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

43.

43. Allowance to witnesses.

ALLOWANCE TO WITNESSES.

	£	s.	d.		£	s.	d.
Gentlemen, merchants, bankers, and professional men, per diem . . from	0	10	0	to	1	0	0
Tradesmen, auctioneers, accountants, clerks, and yeomen, per diem . from	0	5	0	to	0	10	0
Artisans and journeymen, per diem . from	0	3	0	to	0	5	0
Labourers and the like, per diem . from	0	2	0	to	0	3	0

Travelling expenses, sum reasonably paid, but no more than sixpence per mile one way.

County Court Form (A).

A.—SUITS AND PROCEEDINGS IN EQUITY BOOK.

(A.) Register of proceedings.

No of Plaint or Petition_____

Date of filing _____

Parties' Names.	
Plaintiffs.	Defendants.
Name and Address of Plaintiffs' Attorney.	Name and Address of Defendants' Attorney.

Nature of Suit or Proceeding.

County Court Form (A).

Register of Proceedings.

PROCEEDINGS.

By Plaintiff.			By Defendant.		
Letter on filing.		Date.	Letter on filing.		Date.
	Here enter applications for substituted [*or* other] service of summons, subpœnas, injunctions, &c., or documents filed.			Here enter applications for subpœnas, and filing of admissions, statements, &c.	

DECRETAL ORDER MADE ON RETURN DAY OF SUMMONS OR ADJOURNMENT.

Here set forth the nature of the Decretal Order.	Date of Hearing.	Date of Adjournment.

PROCEEDINGS.

By Plaintiff.			By Defendant.		
Letter on filing.		Date.	Letter on filing.		Date.
	Here enter all ex parte applications, or otherwise, and whether made by plaintiff or registrar, documents filed, warrants issued, &c.			Here enter all documents filed, &c.	

Letter on filing.	CERTIFICATE.	Date.	
	Date on which it was directed to be prepared for Court . . . . . Application to vary by . . . . . Application refused [*or* granted] . . Date on which it was filed as confirmed [*or* as varied]		

Letter on filing.	FINAL DECREE.	Date of making.
	Here set forth shortly the particulars of the decree, such as the acts to be done, or sums to be paid, &c.	

Letter on filing.	APPEAL.	Date.
	Here enter proceedings had.	

Letter on filing.	COSTS TAXED.	£ s. d.	Date.
	Plaintiffs' Bill; Defendants' Bill; state out of what fund to be paid, &c.		

EQUITABLE JURISDICTION.

B.—CASH BOOK.

Receipts.					Payments.			
Date.	No. of Plaint or Petition.	Suit or Matter.	Ledger Folio.	Amount.	Date.	No. of Plaint or Petition.	Ledger Folio.	Amount.
		A. B. *v.* C. D.						

C.—LEDGER.

In the suit of *A. B.* v. *C. D.* Plaint No. of .
In the matter of Petition No. of .

Folio in Cash Book.	Date when received.	Names of Persons from whom received.	On what Account and from what source received.	Amount received.	Folio in Cash Book.	Date when paid or allowed.	Names of Persons to whom paid or allowed.	For what purpose paid or allowed.	Amount paid or allowed.

County Court Form (C).
(C.) Registrar's Ledger.

County Court Costs.

Costs of Counsel and Attornies.

A SCALE OF COSTS AND CHARGES

TO BE PAID TO COUNSEL AND ATTORNEYS IN THE COUNTY COURTS.

Under the Provisions of the Statute 28th and 29th Victoria, Chapter 99.

	Lower Scale not exceeding £100.			Higher Scale above £100.		
	£	s.	d.	£	s.	d.
Instructions to sue or defend	0	10	0	0	15	0
Examining, and taking minutes of evidence of each witness, afterwards allowed by the judge	0	3	0	0	5	0
Application for substituted service or service out of England	0	4	0	0	6	0
Service sum allowed by judge						
Drawing plaint or petition or statement by defendant, or preparing instructions for counsel to draw the same, and attendance therewith	0	13	4	1	0	0
Fee to counsel and clerk therewith	1	3	6	2	4	6
Attendance and filing plaint, petition, admission, or statement	0	3	4	0	6	8
Every copy of plaint, petition, admission, or statement	0	2	0	0	3	0
Preparing, and service of notice to inspect, admit, or produce and fair copy	0	4	0	0	6	0
Attending inspecting documents	0	5	0	0	7	0
Mileage one way from the attorney's place of business to place of inspection, for each mile	0	0	6	0	0	6
Preparing admission by defendant	0	3	0	0	5	0
All necessary affidavits not exceeding five folios, including filing, each	0	5	0	0	7	0
If above five folios are allowed upon taxation, then for every additional folio	0	1	0	0	1	0
Attending court, and conducting cause where no counsel employed	1	10	0	2	2	0
Instructions for, and drawing and copy briefs, in causes or matters in which counsel is employed, including attendance on counsel therewith	2	0	0	3	0	0

	Lower Scale not exceeding £100.			Higher Scale above £100.			County Court Costs.
	£	s.	d.	£	s.	d.	Costs of Counsel and Attornies.
Fee to counsel and clerk, not exceeding .	2	4	6	3	5	6	
Attending court on hearing with counsel	0	10	0	0	15	0	
Attending court to support or oppose any application or motion without counsel	0	15	0	1	0	0	
Attending in the last-mentioned cases with counsel	0	10	0	0	15	0	
Fee to counsel and clerk not exceeding	1	3	6	2	4	6	
Every attendance on the registrar which he may think upon taxation was necessary	0	5	0	0	7	0	
When the attendance is longer than one hour, then for every additional hour or part of an hour .	0	4	0	0	6	0	
The like costs for attendance before an examiner.							
Witnesses' expenses in conformity with rule.							
OCCASIONAL COSTS.							
Where in the course of a cause or matter a party suing or sued in a fiduciary or representative character necessarily incurs costs not allowed upon taxation between party and party, the registrar shall apply to the judge to allow such sums as he may think fit out of any funds in court applicable to that purpose.							
For attorney's journey to attend hearing, mileage one way from attorney's place of business to court, for each mile .	0	0	6	0	0	6	
Where in opinion of registrar he could not return same night . . .	1	1	0	1	11	6	
Drawing accounts and other documents not included in the foregoing costs, but allowed upon taxation of costs to be necessary, per folio	0	0	8	0	0	8	
For perusing and adapting old abstracts of title, per three sheets . .	0	3	4	0	3	4	
Drawing abstracts of additional deeds and documents, per three sheets . .	0	6	8	0	6	8	
For preparing conditions and contracts of sale, and fair copy, per folio . .	0	0	8	0	0	8	

County Court Costs.

Costs of Counsel and Attornies.

	Lower Scale not exceeding £100.			Higher Scale above £100.		
	£	s.	d.	£	s.	d.
Where condition and contract are not submitted to counsel, in addition to the above there shall be allowed for perusing abstracts, every three sheets	0	3	4	0	3	4
Where conditions and contracts are to be settled by counsel, instructions to accompany abstract, and attendance therewith, or letter	0	6	8	0	13	4
Fee to counsel						
Fair copies of abstracts of title or of accounts, documents, opinion of counsel, and of papers received from counsel, per folio	0	0	4	0	0	4
Attending sale	1	1	0	2	2	0
Where by any proceeding taken by the opposite party it becomes necessary to advise or receive instruction from a client in the progress of a suit or matter, for each attendance . . .	0	6	8	0	13	4
Attending taxing costs . . .	0	5	0	0	7	0
Letters and messages	0	5	0	0	10	0
COSTS OF THE DAY ON ADJOURNMENT.						
Attending court where no counsel employed	0	15	0	1	0	0
Attending with counsel	0	10	0	0	15	0
Refresher fee to counsel and clerk not exceeding	1	3	6	2	4	6
Witnesses' expenses same as on trial.						
COSTS OF APPEAL.						
Preparing notice of appeal, including copies and service	0	7	0	0	10	0
Preparing case, including copies . .	0	10	0	0	15	0
Attending judge to sign	0	5	0	0	7	0
Attending judge in case of difference to settle	0	10	0	0	15	0
Application to stay proceedings . .	0	7	0	0	10	0
Transmitting case and copies, including notice to successful party . .	0	5	0	0	7	0
Application to judge for leave to proceed on judgment	0	5	0	0	7	0
Depositing decree or order of Court of Appeal	0	3	0	0	4	0

N.B. *The registrar is to tax the bills of costs upon the lower scale when the subject matter of the suit or proceeding does not exceed* 100*l.*, *and upon the higher when it exceeds* 100*l.*

County Court Costs.

Costs of Counsel and Attornies.

We, JOHN BURY DASENT, JOHN WORLLEDGE, RUPERT ALFRED KETTLE, and WILLIAM FURNER, being County Court judges appointed to frame rules and orders for regulating the practice of the courts, and forms of proceedings therein, under the 32nd section of the 19 & 20 Vict. cap. 108, have, under the powers vested in us by the Act 28 & 29 Vict. cap. 99, framed the above scale of costs and charges to be paid to counsel and attorneys in suits and proceedings in equity; and we do hereby certify the same to the Lord Chancellor accordingly.

J. B. DASENT. RUPERT A. KETTLE.
J. WORLLEDGE. WILLIAM FURNER.

I approve of this scale, to come into operation in all County Courts on the 1st day of October, 1865.

CRANWORTH, C.

County Court Costs. Court Fees, &c.

TABLE OF FEES

PAYABLE IN THE COUNTY COURTS,

Under the 28 *&* 29 *Vict. cap.* 99. *On and after the* 1*st of October*, 1865.

FEES PAYABLE TO CONSOLIDATED FUND.

On the commencement of every suit or matter .	£0	10	0
On setting down any matter for hearing . .	1	0	0
On application for final decree or decretal order .	1	0	0

REGISTRARS' FEES.	Where the Subject-matter of the Suit or Proceeding Does not exceed £100. £	s.	d.	Where it exceeds £100. £	s.	d.
For filing every plaint or petition, and issuing summons or notice thereon .	0	6	0	0	9	0
If more than one defendant, then for every additional defendant .	0	2	0	0	2	0
If defendant out of England, then in addition (including filing affidavit)	0	5	0	0	7	0
For filing and sealing every affidavit or other document	0	1	0	0	1	0
For every application to inspect an affidavit	0	1	0	0	2	0
For every summons to a witness . .	0	3	6	0	5	0
For attesting admission of defendant and filing	0	3	6	0	5	0

County Court Costs.

Registrars' Fees.

	Where the Subject-matter of the Suit or Proceeding Does not exceed £100.			Where it exceeds £100.		
	£	s.	d.	£	s.	d.
For filing statement of defendant, or notice by plaintiff for dismissal of cause.	0	2	6	0	4	0
For drawing, filing, and sealing every decretal order, final decree, or an order on a petition, or application for an order in the nature of an injunction (including issuing the copy of same for service)	0	15	0	1	5	0
If more than one copy of decree, &c., to be issued, then for every additional copy	0	2	0	0	2	0
For drawing advertisements and inserting	0	5	0	0	7	0
For advertisements,—sum paid.						
For every sitting in which the registrar is employed in taking accounts, making enquiries, or acting as a special examiner	0	7	0	0	10	0
When the sitting is longer than one hour, then for every additional hour or part of an hour . .	0	5	0	0	7	0
Where the registrar shall be required to attend elsewhere than at the court or office, in addition to the above	0	10	0	1	0	0
Mileage one way from the office to place of examination, for each mile	0	0	6	0	0	6
For application to judge for further directions, including drawing order .	0	7	0	0	12	0
For drawing draft order for an ex parte application, and the order as afterwards made	0	10	0	0	15	0
For certificate directed to be made by any decretal order	0	15	0	1	10	0
For every inspection of certificate at registrar's office	0	1	0	0	2	0
For giving any notice required by any of "The Orders," (including copying)	0	2	0	0	2	6
For office copy of every document, per folio	0	0	4	0	0	4
For making and transmitting note of any decretal order or final decree, or of an order made on petition under Order XXIII., Rule 24	0	2	6	0	3	6

	Where the subject-matter of the suit or Proceeding						County Court Costs.
	Does not exceed £100.			Where it exceeds £100.			Registrars' Fees.
	£	s.	d.	£	s.	d.	
For auditing receiver's accounts where sum in account does not exceed 100*l.*	0	5	0	0	5	0	
And for every additional 50*l.*, or fraction thereof	0	2	6	0	2	6	
For every application for a search and searching	0	2	0	0	2	0	
For taxation of costs	0	5	0	0	7	0	
For payment out of court and taking receipt for dividends on stock, exceeding 1*l.* and not exceeding 5*l.*	0	2	0	0	2	0	
Exceeding 5*l.*	0	3	0	0	3	0	
For procuring investments in consols, 5*s.* per cent. on the amount invested, exclusive of bankers' and brokers' commission.							
For drawing orders under Order XVII., Rule 6 (*a*)	0	4	0	0	4	0	

(*a*) See note (*c*), p. cxiii., *ante*.

For every jury to be paid to the registrar for the use of the jury, 5*s*.

HIGH BAILIFFS' FEES.

For calling the cause	0	2	0	0	3	0	
For service of every summons, petition, notice, or order, not being summonses to jurors—							
If within one mile of Court House	0	2	6	0	5	0	
If beyond one mile, then for every additional mile or part of a mile	0	0	6	0	0	6	
Where service is ordered to be personal, then an additional fee of	0	3	6	0	5	0	
For affidavit of service, when required	0	2	0	0	4	0	
For the execution of each warrant	0	5	0	0	10	0	
With an allowance of mileage, double the amount of the allowance on summonses.							
For keeping possession for each day the man is actually in possession	0	4	6	0	4	6	
3*s.* 6*d.* *of the above sum is to be paid to the man in possession, and his receipt produced to registrar.*							
For superintending sale, whether by auction or private contract, making out							

County Court Costs.

Registrars' Fees.

account, and paying money in court, 2*l.* per cent. on first 50*l.* so paid, and 1*l.* per cent. on all afterwards.

N.B.—*Where the amount or value of the subject matter of the suit or proceeding is not disclosed by the plaint or petition, it shall be taken not to exceed* 100*l.*, *and the Fees charged accordingly. If, however, the judge shall subsequently certify that the amount or value of the subject matter does exceed* 100*l.*, *the difference between the fees up to that time taken and those that would have been taken had it exceeded* 100*l.*, *may then be taken.*

END OF APPENDIX.

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THE END.

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